ALSOP STEVENS BATESONS & CO.
INDIA BUILDINGS
LIVERPOOL
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BATESONS & CO.

CONTRACTS OF SALE.

C.I.F.

(COST, INSURANCE, FREIGHT.)

BY

A. R. KENNEDY,

ONE OF HIS MAJESTY'S COUNSEL.

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To the Memory

OF

MY FATHER.

PREFACE.

THIS book represents an attempt to bring together, in a form convenient and interesting to the reader, whether lawyer, student or commercial arbitrator, the English decisions and judicial dicta relating to contracts of sale, cost, freight and insurance.

It owes its inception to two facts. Firstly, though c.i.f. contracts constitute a highly important instrument of overseas trade, the decisions relating to these contracts are nowhere collected in a very readable or complete form. Secondly, within recent years there have been a number of reported cases raising and settling, or leaving open for further discussion, points of everyday practical importance in relation to c.i f. contracts. When Lord Sumner (then Hamilton, J.) in 1911, in his judgment in *Biddell Bros.* v. *E. Clemens Horst Co.*, said that "the meaning of a contract of sale upon cost, freight and insurance terms is so well settled, that it is unnecessary to refer to authorities upon the subject," he had no reason to anticipate that

two learned Lords Justices would disagree with his view that under a c.i.f. contract, "terms net cash," the buyer is not entitled to wait until arrival of the goods before paying, nor that in the following years questions relating to matters of such importance as, for example, the form of the bill of lading required by a c.i.f. contract, whether a certificate of insurance can be tendered in lieu of a policy, whether documents which have been valid, but have become invalid before tender, constitute a good tender, would be debated in the Courts.

In order to add to the interest of the book and to its practical utility by saving the reader from constant reference to Reports, which are not always readily accessible, I have largely quoted the actual words of judgments on questions of importance, and, wherever facts seemed material, I have extracted them from the Reports and set them out.

Whether, or to what extent, I have overcome the inherent difficulty of separate treatment of a mere branch of the general law relating to the sale of goods, I must leave the reader to judge.

A. R. K.

3, Brick Court,
Temple.
December 10, 1923.

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ADDENDA AND CORRIGENDA.

P. 28, note (*d*). For "p. 163" read "p. 173."

P. 79, note (*i*). Add "*British & Foreign Mar. Ins. Co.* v. *Gaunt*, (1921) 2 A. C. 41."

P. 99, note (*h*). Add "This term is not uncommon; for instance, it appears in forms of c.i.f. contracts used by the London Corn Trade Association."

P. 131, note (*m*). For "p. 166" read "p. 174."

C.I.F. CONTRACTS.

CHAPTER I.

OF THE NATURE OF A C.I.F. CONTRACT.

1. *Introductory.*

THE essential feature of a contract of sale, cost, freight and insurance, is that performance is satisfied by delivery of documents and not by actual physical delivery of the goods. "All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent" (*a*).

Under this form of contract the seller performs his obligations by shipping (*b*), at the time specified in the contract or, in default of express provision in the contract, within a reasonable time, goods of the contractual description on a ship bound for the destination named in the contract, and by tendering to the buyer, as soon as possible after the goods have been destined to him, the shipping documents, *i.e.*, a bill or bills of lading for

(*a*) *Per* McCardie, J., *Manbre Saccharine Co., Ltd.* v. *Corn Products Co., Ltd.*, (1919) 1 K. B. 198, at p. 202. As to other forms of contract for the sale of goods to be sent overseas, see *post*, p. 9.

(*b*) Unless he buys the documents for goods already afloat. This he can do unless the contract requires that he shall actually ship the goods.

carriage of the goods and a policy of insurance covering the reasonable value of the goods together with an invoice showing the amount due from the buyer. On presentation of these documents, if they are complete and regular, the buyer is bound to pay the price, irrespective of the arrival of the goods; but by paying he is not precluded from subsequently rejecting the goods or recovering damages for breach of the contract of sale if on examination the goods are found not to be in accordance with the contract. If the goods are lost in transit or arrive in a damaged condition the buyer ordinarily has his remedy under the policy of insurance or against the carriers under the contract contained in the bill of lading. Whether in any particular case such remedy is available to him depends upon the terms of the policy of insurance and the bill of lading.

In other words, transfer of the bill of lading, accompanied by the policy of insurance, operates as constructive delivery of the goods. Possession of the bill of lading places the goods at the disposal of the buyer. "In the case of goods which are at sea being transmitted from one country to another, you cannot deliver actual possession of them. Therefore, the bill of lading is considered to be a symbol of the goods, and its delivery to be a delivery of them" (*c*). "A cargo at sea," said Bowen, L.J., in *Sanders* v. *Maclean* (*d*), "while in the hands of a carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass,

(*c*) *Per* Lord Hatherley, L.C., *Barber* v. *Meyerstein* (1870), L. R. 4 H. L. 317, at p. 329.

(*d*) (1883), 11 Q. B. D. 327, at p. 341 (C. A.).

just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to someone rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods but also all rights created by the contract of carriage between the shipper and the shipowner (*e*). It is the key which in the hands of the rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be."

The advantages of the c.i.f. contract which have made it an indispensable instrument of overseas trade are manifest. The seller, while taking the risk of the rise or fall in the price of the goods, the cost of carriage (*f*) and the rate of insurance before shipment, has the advantage of being able to obtain payment of the price of the goods before their arrival at their destination and even in the event of their loss or damage in transit. By negotiation of his draft on the buyer he may obtain cash for the goods sold immediately after shipment; or, if the terms of payment are "cash against documents," or "net cash," which is the same thing, he may still obtain payment a considerable time before the goods arrive at their destina-

(*e*) By the Bills of Lading Act, 1855 (18 & 19 Vict. c. 111), s. 1, "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself."

(*f*) For an instance of a c.i.f. contract where the buyer took the risk of the rise of freight after the date of the contract, see *Acetylene Corporation* v. *Canada Carbide Co.* (1921), VI. Lloyd's List, L. R. 410, 468; C. A. VII. 456.

tion. On the other hand, the buyer having received the documents has the power of dealing with the goods for some time, which may be substantial, in advance of their actual arrival. His right to reject the goods, if they turn out not to be in conformity with the contract, remains. The risk which he takes is the risk that loss of or damage to the goods may not be covered by the bill of lading or policy of insurance.

The protection given to the buyer by transfer of the documents is generally, but is not necessarily, sufficient. It is not complete where loss or damage has been caused by a peril excepted by the bill of lading and not covered by the policy of insurance. In such case the buyer must pay the price against the documents though he receives no indemnity in respect of the loss or damage. But in the case of risks customarily excluded by the contract of carriage and the policy of insurance, such, for example, as war risks, the buyer can, and generally does, cover his interests by insurance on his own account.

Sale of Goods Act.

The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), applies to c.i.f. contracts as well as to other forms of contracts of sale. But the application of the Act to questions arising under c.i.f. contracts is not always easy, since the terms of that Act are primarily directed to contracts for the sale of goods which are only satisfied by physical delivery of the goods. In applying the Act to c.i.f. contracts it is, therefore, necessary to remember that under c.i.f. contracts the delivery required is that of the documents representing the goods and not of the actual goods (*g*).

Contracts not strictly c.i.f.

Not every contract of sale which is expressed to be c.i.f. is strictly a c.i.f. contract. Sometimes terms are introduced into contracts in that form which conflict with

(*g*) See *Biddell Bros.* v. *E. Clemens Horst Co.*, *post*, p. 12, and for example, *C. Sharpe & Co.* v. *Nosawa & Co.*, (1917) 2 K. B. 814, *post*, p. 155.

c.i.f. terms (*h*), or, as it frequently happens, forms of contract containing printed terms applicable to contracts on other terms are used to carry out c.i.f. transactions (*i*). In such cases unless the conflicting terms can be disregarded or rejected as repugnant to the intended transaction the character of the contract is changed. Thus, for example, contracts are to be found which, while expressed to be c.i.f., contain terms to the effect that the goods are to be at the risk of the seller until actual delivery to the buyer, that the contract is to be void for any portion shipped but not arriving, that an allowance is to be made for damaged condition on arrival, and that payment is to be on landing or landed weights. Contracts containing such terms are *primâ facie* not c.i.f. contracts. But in *Law & Bonar, Ltd.* v. *Brit. Am. Tobacco Co., Ltd.* (*j*), a printed clause in the contract that the goods were to be *at the seller's risk until actual delivery* to the buyers was treated by Rowlatt, J., as repugnant to a c.i.f. transaction and inapplicable. In *Denbigh, Cowan & Co.* v. *Atcherley & Co.* (*k*) the presence in a contract, expressed to be c.i.f., of the terms "*net landing weights,*" "*should the goods or any portion thereof not arrive from loss of vessel either before or*

(*h*) *The Parchim*, (1918) A. C. 157, is a notable instance of this. The contract there was in the nature of a cross between c.i.f. and f.o.b. (free on board). The price included cost and chartered freight, but did not include the premium for insurance; and there were provisions that in a certain event the buyer was to find another ship to take the goods, and in that event was to pay for storage until loading and any excess freight over the chartered freight.

(*i*) "The practice of mercantile men of writing into their printed forms the particular terms by which they desire to describe and limit the risk intended to be insured against without striking out the printed words which may be applicable to a larger or different contract, is too well known, and has been too constantly recognised in Courts of law." *Per* Lord Penzance, *Dudgeon* v. *Pembroke* (1877), 2 A. C. 284, at p. 293.

(*j*) (1916) 2 K. B. 605.

(*k*) (1921), 90 L. J. K. B. 836 (C. A.). See *post*, p. 88.

after declaration this contract for such portion to be void," "payment cash (before delivery if required) against documents *or delivery order*" (*l*), did not prevent the Court of Appeal from holding that the contract was to be treated as a c.i.f. contract.

But the mere fact that there is a reference to delivery or arrival in a c.i.f. contract is not sufficient to alter the effect of the c.i.f. terms. Thus in *Tregelles* v. *Sewell* (*m*) the contract was for the sale of "300 tons Old Bridge rails at 5*l*. 14*s*. 6*d*. per ton *delivered at Harburgh,* cost, freight and insurance; payment by net cash in London, less freight, upon handing bill of lading and policy of insurance," and it was held in the Court of Exchequer and the Exchequer Chamber that according to the true construction of the contract the seller did not contract to deliver the iron at Harburgh; that when he put it on a ship bound for Harburgh and handed to the buyers the policy of insurance and other documents, his liability ceased and the goods were at the risk of the buyer. For the parties, of course, contemplate the delivery of the goods sold at their destination, and it is, therefore, not unnatural that references to arrival of the ship or the goods or delivery of the goods should be found in many contracts expressed to be on c.i.f. terms. A common case is where the contract is expressed to be c.i.f. but provides for payment on arrival of the ship. In such case if the ship is lost, unless the language used implies a condition of arrival before the liability to pay

(*l*) The insertion of this last stipulation was stated to have arisen from difficulties which had been encountered, firstly, where merchants sold portions of goods covered by one bill of lading and delivered the bill of lading, and, secondly, where they covered all the cargo under one policy of insurance and delivered parts of the cargo to individual buyers.

(*m*) (1862), 7 H. & N. 574. And see *per* Kennedy, L.J., *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 934, at p. 963. For earlier cases where the contracts were in somewhat similar form, see 7 H. & N. at p. 586, note.

arises, payment is due at the time when the ship in ordinary course would have arrived. In other words, the term as to arrival of the ship denotes the time when payment is due and is not a condition of payment (*n*). A provision that payment is to be against documents "on arrival of the goods" (*o*) is also quite common. The effect probably is to make arrival a condition of payment. In *Dupont* v. *British S. Africa Co.* (*p*), where there were sales of bullocks to be shipped at Buenos Ayres c.i.f. Beira and the contracts provided that half the price was payable on shipment in exchange for the documents and the balance was to be paid upon delivery of the shipments, Kennedy, J., held that the balance of the price was payable only if and so far as the sellers were in a position to give delivery of the shipments, *i.e.*, on the contingency of the goods arriving. Similarly, in *Polenghi* v. *Dried Milk Co.* (*q*), where the contract, expressed to be c.i.f. London, contained the clause "payment to be made in cash in London *on arrival of the powders* against shipping or railway documents,"

(*n*) Cf. *Fragano* v. *Long* (1825), 4 B. & C. 219, where an order was sent from Naples to Birmingham for goods "to be despatched on insurance being effected. Terms to be three months' credit from the time of *arrival*." The goods were damaged in transit. Held, that the property in the goods vested on despatch, and that the terms of the order did not make the arrival of the goods at Naples a condition precedent to the liability to pay for them. "If the goods were not to be paid for unless they arrived, why should the plaintiff (buyer) insure them? That shows that the arrival was not considered as a condition precedent to the payment. . . . If they did not arrive, still the plaintiff would be bound to pay in a reasonable time after the arrival became impossible." *Per* Bayley, J., *ibid.* p. 222.

(*o*) See, as to sales of goods "to arrive," Benjamin on Sale, Bk. IV., Pt. I., Ch. II.

(*p*) (1901), 18 T. L. R. 24. The decision in *Calcutta and Burmah Steam Navigation Co.* v. *De Mattos* (1863), 32 L. J. Q. B. 322; 33 *ibid.* 214, on a contract for delivery at Rangoon, containing similar terms as to payment, was to a similar effect.

(*q*) (1904), 10 Com. Cas. 42.

Kennedy, J., said that the sellers, to obtain payment, must show that the goods were *arrived goods*. But, unless the contract clearly requires otherwise, such a provision, it is submitted, ought to be construed as merely specifying the time when, and not stating a condition upon which, payment is to be made (*r*); that is to say, if the goods shipped do not arrive, payment will be due against the shipping documents at the time when, but for the loss, the goods would have arrived. If this construction cannot be placed upon the words, the contract is not really a c.i.f. contract.

In the case of contracts c.i.f. on printed forms containing terms inapplicable to c.i.f. contracts, "the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied) are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language of and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects" (*s*). In *Glynn* v. *Margetson & Co.* (*t*), Lord Herschell said that: "Where general words are used in a printed form which are obviously intended to apply, so far as they are applicable, to the circumstances of a particular contract, which particular contract is to be embodied in or introduced into that printed form, I think you are justified in looking at the main object and intent of the contracts and in limiting the general words used, having in view that object and intent" (*u*); and Lord

(*r*) Cf. *Fragano* v. *Long, ubi supra.*

(*s*) *Per* Lord Ellenborough, *Robertson* v. *French* (1803), 4 East, 130, at p. 136.

(*t*) (1893) A. C. 351.

(*u*) *Ibid.* at p. 355.

Halsbury said (*x*): "Looking at the whole of the instrument, and seeing what one must regard . . . as its main purpose, one must reject words, indeed whole provisions, if they are inconsistent with what one assumes to be the main purpose of the contract."

In these pages it is intended, in general, to refer only to contracts which are properly described as c.i.f. contracts, and no useful purpose would be served by further attempting to distinguish between particular terms and expressions the presence of which—whether caused by inadvertence, or by misapprehension of the rights and duties of parties under c.i.f. contracts or otherwise—may or may not have the effect of converting a contract expressed to be c.i.f. into a different form of contract.

The fact, however, is to be noted that there is considerable laxity in the use of forms of contract for the sale of goods sent overseas, and the interpretation of any particular contract of sale expressed to be c.i.f. may present real difficulty. The statement of Lord Cairns that "merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance" (*y*) requires some qualification to-day.

F.o.b., ex-ship and "arrival" contracts.

The c.i.f. contract is to be distinguished from other forms of contract for the sale of goods sent overseas. Of these the most common are the f.o.b. (free on board), "ex-ship" and "arrival" contracts. Under the normal f.o.b. contract the seller has to put the goods on ship at his own expense, whereupon the seller's contractual liability ceases, delivery is complete, and the property and risk in the goods (unless by the special terms of the contract they have already passed) pass to the buyer, who becomes responsible for freight and all subsequent charges (*z*).

(*x*) *Ibid.* at p. 357.

(*y*) In *Bowes* v. *Shand* (1877), 2 A. C. 455, at p. 463.

(*z*) *Stock* v. *Inglis* (1884), 12 Q. B. D. 564; H. L. 10 A. C. 263; *Wimble* v. *Rosenberg,* (1913) 3 K. B. 743 (C. A.); *Colley* v. *Overseas*

In the case of a sale "ex-ship," says Lord Sumner (*a*), "the seller has to cause delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein which is usual for delivery of goods of the kind in question. The seller has, therefore, to pay the freight or otherwise to release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Till this is done the buyer is not bound to pay for the goods," and the goods are not at his risk. In an "arrival" contract, that is, a contract for the sale of goods subject to arrival, the obligation to pay does not arise until the goods have arrived at the place indicated in the contract, and until their arrival the goods are at the seller's risk (*b*).

Exporters, (1921) 3 K. B. 302. In *Maine* v. *Sutcliffe* (1917), 23 Com. Cas. 216, it was held that buyers were not entitled to waive delivery on board ship and take delivery at the place of shipment. For an instance of a cross between an f.o.b. contract and a c.i.f. contract, see *The Parchim, ante*, p. 5, n. (*h*). In *Couturier* v. *Hastie* (1852), 8 Ex. 40, there was a sale of corn, shipped, "free on board, and including freight and insurance to a safe port in the United Kingdom," payment upon handing over shipping documents.

(*a*) *Yangtsze Insce. Assoc.* v. *Lukmanzee*, (1918) A. C. 585 (P. C.), at p. 589. In this case the sale was of teak logs "ex ship," "payment cash against documents." The sellers, by a policy in the usual form, insured the logs for the voyage and to cover craft and raft risk. The buyer paid for and took delivery of the logs ex ship, but while they were afloat in the form of rafts part of them were driven out to sea in a gale and lost. The buyer sought to recover his loss under the policy effected by the sellers. It was held that as the goods were not at the buyer's risk during the voyage, there was nothing from which to infer an obligation on the sellers, and therefore an intention on their part, to effect an insurance on the buyer's behalf, and consequently the buyer could not sue on the policy.

(*b*) As to sales of goods "to arrive," see Benjamin on Sale, Bk. IV., Pt. I., Ch. II. "Subject to safe arrival" was considered in *Barnett* v. *Javeri & Co.*, (1916) 2 K. B. 390, where Bailhache, J., held that the word "safe" showed that the event provided against was non-arrival of the goods *after shipment*, and therefore there was an absolute obligation on the seller to ship or to see that the goods were shipped, and, not having done so, he was liable for non-delivery.

2. *Judicial Definition.*

Ireland v. *Livingston.*

For judicial description of a c.i.f. contract, it is not necessary to go back further than fifty years to the well-known exposition of Blackburn, J., in the case of *Ireland* v. *Livingston* (*c*), where he said (*d*): "The terms at a price 'to cover cost, freight and insurance, payment by acceptance on receiving shipping documents,' are very usual, and are perfectly well understood in practice. The invoice is made out debiting the consignee with the agreed price (or the actual cost and commission, with the premiums of insurance, and the freight as the case may be), and giving him credit for the amount of freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and policy of insurance. Should the ship arrive with the goods on board he will have to pay the freight which will make up the amount he has engaged to pay. Should the goods not be delivered in consequence of a peril of the sea, he is not called on to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowners. . . .

"In such a case it is obvious that if freight is high, the consignor gets the less for the goods he supplies, if freight is low he gets the more. But inasmuch as he has contracted to supply the goods at this price he is bound to do so, though, owing to the rise in prices at the port of shipment making him pay more for the goods, or of freight causing him to receive less himself, because the shipowner receives more, his bargain may turn out

(*c*) (1872), L. R. 5 H. L. 395.
(*d*) *Ibid.* at p. 406.

a bad one. On the other hand, if owing to the fall of prices in the port of shipment, or of freight, the bargain is a good one, the consignee still must pay the full agreed price. This results from the contract being one by which the one party binds himself absolutely to supply the goods in a vessel such as is stipulated for, at a fixed price, to be paid for in the customary manner, that is, part by acceptance on receipt of the customary documents, and part by paying the freight on delivery, and the other party binds himself to pay that fixed price. Each party there takes upon himself the risk of the rise or fall in price."

Biddell Bros. v. E. Clemens Horst Co.

More elaborate and reasoned statements are to be found in the leading case of *Biddell Bros.* v. *E. Clemens Horst Co.* (*e*). In that case a contract of sale of hops to be shipped from the Pacific coast to this country provided that the buyers should pay for the hops at the rate of 90 shillings sterling per 112 lbs. "C.i.f. to London, Liverpool or Hull. Terms net cash." There was no term expressly providing for payment against shipping documents. The question involved was whether the buyers were bound to pay the price on tender of the shipping documents or were entitled to refuse payment until, upon arrival of the hops, they had been given an opportunity for inspection of them. Hamilton, J., decided in favour of the former view. The Court of Appeal (Vaughan Williams and Farwell, L.JJ., Kennedy, L.J., dissenting) reversed this decision. The House of Lords unanimously adopted the dissenting judgment of Kennedy, L.J., and restored the decision of Hamilton, J. In the course of his judgment Hamilton, J., described the incidents of a c.i.f. contract in the following terms (*f*):—

Per Hamilton, J.

"The contract is to pay for the said hops at the rate

(*e*) (1911) 1 K. B. 214; reversed, C. A. *ibid.* 934; restored, (1912) A. C. 18.

(*f*) (1911) 1 K. B. at p. 220.

of ninety (90) shillings sterling per 112 lbs. c.i.f. to London, Liverpool or Hull," and the meaning of a contract of sale upon cost, freight and insurance terms is so well settled that it is unnecessary to refer to authorities upon the subject. A seller under a contract of sale containing such terms has firstly to ship at the port of shipment goods of the description contained in the contract (*g*); secondly to procure a contract of affreightment, under which the goods will be delivered at the destination contemplated by the contract (*g*); thirdly, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer; fourthly, to make out an invoice as described by Blackburn, J., in *Ireland* v. *Livingston* (*h*) or in some similar form; and finally to tender these documents to the buyer so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss if they are lost on the voyage. Such terms constitute an agreement that the delivery of the goods,

(*g*) Scrutton, J., said, as to these requisites, in *Landauer & Co.* v. *Craven & Speeding Bros.*, (1912) 2 K. B. at p. 105: "I should myself add to the first requisite the words 'within the time named in the contract'; and to the second that such a contract must be procured on shipment. I should make the last addition for the reason that the seller must, as soon as possible after he has sent forward the cargo, send forward the documents to the vendee or consignee. See *per* Lord Esher, in *Sanders* v. *Maclean*" (1883), 11 Q. B. D. 327, at p. 337. Both additions were referred to with approval in *Hanson* v. *Hamel & Horley, Ltd.* (1920), 26 Com. Cas. 107; C. A., *ibid.* 236; H. L., (1922) 2 A. C. 36; but with regard to the former, Lord Sumner, with whose judgment in the House of Lords the other Lords agreed, stated (at p. 47): "I do not understand this proposition as meaning that the bill of lading would be bad unless it was signed contemporaneously with the actual placing of the goods on board. 'On shipment' is an expression of some latitude. Bills of lading are constantly signed after the loading is complete and, in some cases, after the ship has sailed. I do not think that they necessarily cease to be procured 'on shipment,' nor do I suppose that the learned judge so intended his words."

(*h*) *Ante*, p. 11.

provided that they are in conformity with the contract, shall be delivery on board ship at the port of shipment. It follows that against tender of these documents, a bill of lading, invoice and policy of insurance, which completes delivery in accordance with that agreement, the buyer must be ready and willing to pay the price.

"It is said that sect. 34 (*i*) of the Sale of Goods Act, 1893, requires that before the delivery can be one in accordance with the contract, against which the price must be paid, the seller must afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. It is well settled law, and the case of *Polenghi* v. *Dried Milk Co.* (*j*) affords an instance of it, that where, either by the express terms of the contract or by implication from the letters c.i.f. in the contract, payment has to be made against documents, the buyer's right to examine the goods and reject them if they are not in conformity with the contract still remains unimpaired. I certainly cannot infer that, where the parties have dealt on c.i.f. terms, the buyer is not afforded a reasonable opportunity of examining the goods, though he may be bound to pay the price against tender of the documents and have no opportunity of seeing the goods until arrival at their destination. Nor does the fact that the buyer cannot see the goods until their arrival make the contract inconsistent with the provisions of sect. 28 of the Sale of Goods Act, 1893, which provides that 'unless other-

(*i*) "(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

"(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

(*j*) (1905), 10 Com. Cas. 42, *post*, p. 128.

wise agreed' delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods. Either the letters c.i.f. in these contracts constitute an agreement 'otherwise' within the section, or possession must be deemed to have been given under the contracts when the hops have been put on board and the documents, which represent them and include the bill of lading, have been tendered to the buyers."

Per Kennedy, L. J.

The dissenting judgment of Kennedy, L.J., in the Court of Appeal in the same case was approved and adopted in the House of Lords in such terms that it must be regarded as the authoritative statement of the law, and it is therefore desirable to quote a considerable portion of it.

The Lord Justice, after stating his view that the expression in the contract in question "net cash" was equivalent to the fuller expression "net cash against documents," proceeded (*k*):—

"The application of the principles and rules of the common law, now embodied in the Sale of Goods Act, 1893, to the business transaction embodied in the c.i.f. contract appears to me to be decisive of the issue between these parties. Let us see, step by step, how according to those principles and rules the transaction specified in such a c.i.f. contract as that before us is and, I think, must be carried out in order to fulfil its terms.

"At the port of shipment—in this case San Francisco —the vendor ships the goods intended for the purchaser under the contract. Under the Sale of Goods Act, 1893, s. 18 (*l*), by such shipment the goods are appropriated

(*k*) (1911) 1 K. B. at p. 955.

(*l*) Sect. 18, Rule 5, is as follows:—

"(i.) Where there is a contract for the sale of unascertained or

by the vendor to the fulfilment of the contract, and by virtue of sect. 32 (*m*) the delivery of the goods to the carrier—whether named by the purchaser or not—for the purpose of transmission to the purchaser is *primâ facie* to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c.i.f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit (*n*), and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative; see the judgments of Bramwell, L.J., and Cotton,

future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

" (ii.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

(*m*) Sect. 32 (1) is as follows:—

" Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery of the goods to the buyer."

(*n*) This statement was not intended to convey the idea that the right of the buyer to receive a policy of insurance was limited to the case where the goods are lost in transit. See *infra*, p. 120. The seller is bound to hand to the buyer a policy of insurance in all cases, unless he is excused from so doing by the terms of the contract. See *infra*, p. 87.

L.J., in *Mirabita* v. *Imperial Ottoman Bank* (*o*). It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative, as consignee. But the vendor, in the absence of special agreement, is not yet in a position to demand payment from the purchaser; his delivery of the goods to the carrier is, according to the express terms of sect. 32, only '*primâ facie* deemed to be a delivery of the goods to the buyer'; and under sect. 28 of the Sale of Goods Act, 1893 (*p*), as under the common law (an exposition of which will be found in the judgments of the members of the Exchequer Chamber in the old case of *Startup* v. *MacDonald* (*q*)), a tender of delivery entitling the vendor to payment of the price must, in the absence of contractual stipulation to the contrary, be a tender of possession. How is such a tender to be made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit (*r*) by a policy of insurance. The bill of lading in law and in fact represents the goods. Possession of the bill of lading places the goods at the disposal of the purchaser. The meaning of 'delivery' under the Sale of Goods Act is defined by sect. 62 to be 'voluntary transfer of possession from one person to another.' Such delivery . . . may be either actual or constructive: see Chalmers, Sale of Goods Act, 1893, 7th ed. p. 140 (*s*); and, as Bowen, L.J., has pronounced (*t*), in the case of

(*o*) (1878), 3 Ex. D. 164, *post*, p. 142.

(*p*) Sect. 28 is as follows:—

"Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

(*q*) (1843), 6 Man. & G. 593.

(*r*) See n. (*n*), *supra*.

(*s*) Now 8th ed., p. 134.

(*t*) *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327, at p. 341, cited *ante*, p. 2.

seaborne goods, the delivery of the bill operates as a symbolical delivery of goods. But then I understand it to be objected on behalf of the plaintiffs: 'Granted that the purchaser might, if he pleased, take this constructive delivery and pay against it the price of the goods; what is there in the "cost freight and insurance" contract which compels him to do so? Why may not he insist on an option of waiting for a tender of delivery of the goods themselves after having had an opportunity of examining them after their arrival?'

"There are, I think, several sufficient answers to such a proposition. In the first place, an option of a time of payment is not a term which can be inferred, where the contract itself is silent. So far as I am aware, there is no authority for the inference of an option as to times of payment to be found either in the law books or in the Sale of Goods Act. Secondly, if there is a duty on the vendor to tender the bill of lading, there must, it seems to me, be a corresponding duty on the part of the purchaser to pay when such a tender is made. Very relevant on this point is the language of Brett, L.J., in his judgment in *Sanders* v. *Maclean* (*u*), which applies to this class of contract the same principle as was expounded by Bowen, L.J., in *The Moorcock* (*x*). He said: 'The stipulations which are inferred in mercantile contracts are always that the party will do what is mercantilely reasonable'; and, if it be the duty implied in the c.i.f. contract, as held by Brett, L.J., in that case (*y*), that

(*u*) (1883), 11 Q. B. D. 327, at p. 337.

(*x*) (1889), 14 P. D. 64 (C. A.).

(*y*) The correct view of this passage is that the Lord Justice intended to adopt the judgment of Brett, M.R. *Per* Atkin, J., *C. Sharpe & Co.* v. *Nosawa & Co.*, (1917) 2 K. B. 814, at p. 819. The passage in Brett, M.R.'s judgment referred to is as follows:— "I quite agree that he (seller of goods at sea) has no right to keep the bill of lading in his pocket, and when it is said that he should do what is reasonable, it is obvious the reasonable thing is that he should make *every reasonable exertion to send forward* the bill of lading as

the vendor shall make every reasonable exertion to send forward and tender the bill of lading as soon as possible after he has destined the cargo to the particular vendee, it is, I venture to think, 'mercantilely reasonable' that the purchaser should be held bound to make the agreed payment when delivery of the goods is constructively tendered to him by the tender of the bill of lading, either drawn originally in his favour or indorsed to him, and accompanied in the case of loss (*z*) by the policy of insurance. For thereunder, as the bill of lading, with its accompanying documents, comes forward by mail, the purchaser obtains the privilege and absolute power of profitably dealing with the goods days or weeks, or, perhaps in the case of shipments from a distant port, months, before the arrival of the goods themselves. This is, indeed, the essential and peculiar advantage which the buyer of imported goods intends to gain under the c.i.f. contract according to the construction which I put upon it.

"But, in truth, the duty of the purchasers to pay against the shipping documents, under such a contract as the present, does not need the application of that doctrine of the inference in mercantile contracts that each part will do what is 'mercantilely reasonable,' for which we have the great authority of Lord Esher. The plaintiffs' assertion of the right under a cost, freight and insurance contract to withhold payment until delivery of the goods themselves, and until after an opportunity of examining them, cannot possibly be effectuated except in one of two ways. Landing and delivery can rightfully be given by the shipowner only to the holder of the bill of lading. Therefore, if the plaintiffs' contention is right, one of two things must happen. Either the seller must surrender to

soon as possible after he has destined the cargo to the particular vendee or consignee."

(*z*) See *ante*, p. 16, n. (*n*).

the purchaser the bill of lading, whereunder the delivery can be obtained without receiving payment, which, as the bill of lading carries with it an absolute power of disposition, is, in the absence of a special agreement in the contract of sale, so unreasonable as to be absurd; or, alternatively, the vendor must himself retain the bill of lading, himself land and take delivery of the goods, and himself store the goods on quay (if the rules of the port permit), or warehouse the goods, for such time as may elapse before the purchaser has an opportunity of examining them. But this involves a manifest violation of the express terms of the contract: '90*s.* per 112 lbs. cost, freight and insurance.' The parties have in terms agreed that for the buyers' benefit the price shall include freight and insurance, and for his benefit nothing beyond freight and insurance. But, if the plaintiffs' contention were to prevail, the vendor must be saddled with the further payment of those charges at the port of discharge which *ex necessitate rei* would be added to the freight and insurance premium which alone he has by the terms of the contract undertaken to defray.

"Finally, let me test the soundness of the plaintiffs' contention that according to the true meaning of this contract their obligation to pay arises only when delivery of the goods has been tendered to them after they have had an opportunity of examination, in this way. Suppose the goods to have been shipped, the bill of lading taken, and the insurance for the benefit of the buyer duly effected by the seller, as expressly stipulated in the contract. Suppose the goods then during the ocean transit to have been lost by the perils of the sea. The vendor tenders the bill of lading, with the insurance policy and the other shipping documents (if any) to the purchaser, to whom from the moment of shipment the property has passed, and at whose risk, covered by the insurance, the goods were at the time of loss. Is it, I ask myself, arguable that the purchaser could be heard

to say, 'I will not pay because I cannot have delivery of and an examination of the goods'? But it is just this which is necessarily involved in the contention of these plaintiffs. The seller's answer, and I think conclusive answer, is, 'You have the bill of lading and the policy of insurance.' It is noticeable in the course of the argument in *Tregelles* v. *Sewell* (*a*), Martin, B., observes, 'The purchaser was to have a policy of insurance, which is usually considered as the equivalent of the goods,' and earlier in the same argument Wilde, B. (*b*), asked, 'If the meaning is "to be delivered at Harburgh," what necessity is there for insurance?' The contract in that case was a contract in the fuller form, namely, against documents, but it does not seem to me that that affects the value of those observations as to the relative rights of the buyer and seller.

"I have only to add as to this, the main question in the present case, a few words in regard to sects. 28 (*c*) and 34 of the Sale of Goods Act (*d*). As I have already said, my own view as to sect. 28 is that the section is satisfied by the readiness and willingness of the seller to give possession of the bill of lading. I am, however, far from saying that the view which is suggested in the course of the judgment of Hamilton, J., namely, that when the parties have entered into a c.i.f. contract they have 'otherwise agreed,' is not one which could be supported, as I hold that a similar view is the true view also in regard to sect. 34, sub-sect. 2 (*d*). As to sect. 34, sub-sect. 1 (*d*), there is no difficulty. No one suggests that the plaintiffs, if they pay against documents, become thereby precluded from rejecting the goods if, on examination after their arrival, they are found to be not goods in accordance with the contract, or from recovering

(*a*) (1862), 7 H. & N. 574, 579, *ante*, p. 6.
(*b*) *Ibid.* at p. 578.
(*c*) Set out *ante*, p. 17, n. (*p*).
(*d*) Set out *ante*, p. 14, n. (*i*).

damages for breach of contract if they prefer that course" (*e*). The Lord Justice concluded by saying that the buyers' contention involved the proposition that the sellers were bound to deliver the goods themselves in this country, which would be inconsistent with a c.i.f. contract.

In the House of Lords (*f*) (Lord Loreburn, L.C., Lords Atkinson, Gorell and Shaw) the judgment of Kennedy, L.J., was adopted in terms.

Per Scrutton, J., *Arnhold Karberg & Co.* v. *Blythe.*

Scrutton, J., in the case of *Arnhold Karberg & Co.* v. *Blythe* (*g*) expressed himself as strongly of opinion that the key to many of the difficulties arising on c.i.f. contracts was to keep firmly in mind that a c.i.f. sale is not a sale of goods, but a sale of documents relating to the goods. "It is not a contract that goods shall arrive, but a contract to ship goods complying with the contract of sale, to obtain, unless the contract otherwise provides, the ordinary contract of carriage to the place of destination, and the ordinary contract of insurance of the goods on that voyage, and to tender these documents against payment of the contract price. The buyer then has the right to claim the fulfilment of the contract of carriage, or, if the goods are lost or damaged, such indemnity for the loss as he can claim under the contract of insurance. *He buys the documents, not the goods,* and it may be that under the terms of the contracts of insurance and affreightment he buys no indemnity for the damage that has happened to the goods. This depends on what documents he is entitled to under the contract of sale. In my view, therefore, the relevant question will generally be not 'what at the time of declaration or tender of documents is the condition of the goods?' but 'what, at the time of tender of documents,

(*e*) See *Polenghi* v. *Dried Milk Co.* (1905), 10 Com. Cas. 42, *post*, p. 128.

(*f*) (1912) A. C. 18.

(*g*) (1915) 2 K. B. 379, at p. 388; C. A., (1916) 1 K. B. 495.

was the condition of those documents as to compliance with the contract of sale?' "

The statement that a c.i.f. sale is a sale of documents is a useful phrase to remember, particularly when questions as to damages for breach of the contract arise, but it is a phrase only, for, as a legal interpretation, it was expressly dissented from in the Court of Appeal by Bankes and Warrington, L.JJ., in the same case (*h*). The contract is more correctly described as "a contract for the sale of goods to be performed by the delivery of documents" (*h*). The difference of view is one of language only, said McCardie, J., in a later case (*i*); "the obligation of the vendor is to deliver documents rather than goods—to transfer symbols rather than the physical property represented thereby."

Per Atkin, J., *Sharpe* v. *Nosawa.*

In *C. Sharpe & Co.* v. *Nosawa & Co.* (*k*), Atkin, J., said: "It is reasonably plain that such a contract is performed by the vendor taking reasonable steps to deliver as soon as possible after shipment the shipping documents, including the bill of lading and policy of insurance, and the buyer paying the price against the documents unless there is some other stipulation as to payment in the contract . . . the contract is performed in fact, and the date of its performance is the date when the documents would come forward, the vendor making every reasonable effort to forward them" (*l*).

Per Lord Atkinson, *Johnson* v. *Taylor.*

The last judicial statement of the incidents of a c.i.f. contract which it is necessary to cite is that of Lord Atkinson in the House of Lords in *Johnson* v. *Taylor Bros. & Co.* (*m*). He summarised the effect of the autho-

(*h*) (1916) 1 K. B. 495, at pp. 510, 514. The difference is "one of language rather than of substance": Scrutton on Charter-parties, 12th ed., p. 192, n. (*l*).

(*i*) *Manbre Saccharine Co.* v. *Corn Products Co.*, (1919) 1 K. B. 198, at p. 203.

(*k*) (1917) 2 K. B. 814.

(*l*) *Ibid.* pp. 818, 819.

(*m*) (1920) A. C. 144, at p. 155.

rities in the following terms: "The authorities I shall presently cite establish clearly, I think, that when a vendor and purchaser of goods situated as they were in this case (*n*) enter into a c.i.f. contract, such as that entered into in the present case (*o*), the vendor, in the absence of any special provision to the contrary, is bound by his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure (*p*) a contract of affreightment under which goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading, and policy of assurance, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk (*q*) and entitling the seller to payment of their price. These authorities are: *Ireland* v. *Livingston* (*r*), *per* Blackburn, J.; *Biddell Bros.* v. *E. Clemens Horst & Co.* (*s*); on appeal, *E. Clemens Horst & Co.* v. *Biddell Bros.* (*t*); and *C. Sharpe & Co.* v. *Nosawa Co.* (*u*). These cases also establish that if no place be named in the c.i.f. contract for the tender of the shipping documents

(*n*) Seller in Sweden and buyers in England.

(*o*) Ordinary c.i.f. terms.

(*p*) There should be added the words "on shipment." See *ante*, p. 13, n. (*g*).

(*q*) The view expressed by Kennedy, L.J., in *Biddell Bros.* v. *E. Clemens Horst Co.* was that *primâ facie* the risk passes on shipment conditionally on the seller presenting proper shipping documents (*ante*, p. 16); and see *Ireland* v. *Livingston*, L. R. 5 H. L. at p. 409. See, further, as to this, *post*, p. 138.

(*r*) (1871), L. R. 5 H. L. 395, 406, *ante*, p. 11.

(*s*) (1911) 1 K. B. 934, 962, *ante*, pp. 12—22.

(*t*) (1912) A. C. 18.

(*u*) (1917) 2 K. B. 814, *ante*, p. 23.

they must *primâ facie* be tendered at the residence or place of business of the buyer" (*x*).

Position of consignor commission agent.

The judgments so far cited have dealt with the contract of sale c.i.f. *simpliciter*. But the consignor may be an agent to procure goods on commission for despatch to the consignee. In such case the legal position seems to be that the commission agent while bound under the contract of agency to use reasonable skill and diligence to procure the goods ordered at or below the limit of price given to him by his principal, and to ship and insure them on terms as favourable as he can obtain, after shipment becomes in relation to his principal a quasi-seller with the rights of a seller, *e.g.*, the right of stoppage *in transitu*. The legal position was thus defined by Blackburn, J., in *Ireland* v. *Livingston* (*y*):—

"It is also very common for the consignor to be an agent who . . . merely accepts an order, by which he binds himself to use due diligence to fulfil the order. In that case he is bound to get the goods as cheap as he reasonably can, and the sum inserted in the invoice represents the actual cost and charges at which the goods are procured by the consignor, with the addition of a commission; and the naming of a maximum limit shows that the order is of that nature.

"The contract of agency is precisely the same as if the order had been to procure goods at or below a certain price, and then ship them to the person ordering them, the freight being in no ways an element in the limit. But when, as in the present case, the limit is made to include cost, freight and insurance, the agent must take

(*x*) In *Stein, Forbes & Co.* v. *County Tailoring Co.* (1916), 115 L. T. 215, Atkin, J., at p. 216, doubted whether, in the absence of express stipulation or trade usage or course of business importing such a stipulation, the seller is under an obligation to tender the documents at the buyer's office. He thought that sect. 29 (1) of the Sale of Goods Act, 1893, provided the contrary. See, further, as to this, *post*, p. 110.

(*y*) (1872), L. R. 5 H. L. 395, at p. 407.

care in executing the order that the aggregate of the sums which his principal will have to pay does not exceed the limit prescribed in his order; if it does, the principal is not bound to take the goods. . . . The agent, therefore, as is obvious, does not take upon himself any part of the risk or profit which may arise from the rise and fall of prices, and is entitled to charge commission, because there is a contract of agency. . . . It is quite true that the agent who, in thus executing an order, ships goods to his principal is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them . . . and just so does the property in the goods pass from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. The legal effect of the transaction (*z*) between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from the one to the other; and, consequently, the commission merchant is a vendor, and has the right of one as to stoppage *in transitu*.

"My opinion is, for the reasons I have indicated, that when the order was accepted by the plaintiffs (commission merchants) there was a contract of agency, by which the plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this superadded sale is not in any way inconsistent with the contract of agency existing between the parties,

(*z*) "By the legal effect of the transaction, he means the legal effect of an analogous contract to that of purchase and sale." *Per* Lindley, L.J., *Cassaboglou* v. *Gibb* (1883), 11 Q. B. D. 797, at p. 807.

by virtue of which the plaintiffs were under the obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could."

It had previously been held, in the case of *Feise* v. *Wray* (*a*), that a commission agent who had bought goods on account and by order of his principal on his own credit in a foreign port and had shipped the goods to London, drawing bills on his principal, was entitled to stop the goods *in transitu* on his principal becoming bankrupt; that for the purpose of stopping the goods *in transitu* the parties "stood in the relative situation of vendor and vendee; though perhaps not so as for all purposes." And the principle of this case had been recognised in other cases (*b*).

In *Cassaboglou* v. *Gibb* (*c*) the Court of Appeal (Brett, M.R., Lindley and Fry, L.JJ.) held that, upon breach of an executory contract by a commission agent to supply his principal with goods, the damages were to be assessed as between principal and agent, and not as between seller and buyer. There the plaintiff, a London merchant, gave orders to the defendants, who were commission agents in Hong-Kong, to buy for him ten cases of the finest "dry new crop Persian opium." Opium of this kind could not be then bought in Hong-Kong, but the defendants, instead of so informing the plaintiff, by mistake informed him that they could procure it, and they purchased and shipped opium which they supposed to be of the contractual description but which was in fact of an inferior description. In an action for damages by the London merchant it was held that he was entitled to recover not the difference between the value of the opium ordered and that shipped, but the loss actually sustained by him in consequence of the opium not being of the

(*a*) (1802), 3 East, 93.

(*b*) *E.g.*, *Tucker* v. *Humphrey* (1828), 4 Bing. 516; *Hawkes* v. *Dunn* (1831), 1 C. & J. 519.

(*c*) (1883), 11 Q. B. D. 797.

description ordered. Brett, M.R., and Fry, L.J., explained the statement of Blackburn, J., in *Ireland* v. *Livingston*, cited *supra*, as to the legal effect of the transaction, saying that the contract between the commission agent and his principal is not one of seller and buyer, but a contract analogous thereto, placing the commission agent *after shipment* of the goods ordered in the position of a quasi-vendor for certain purposes only, that the contract of principal and agent is not turned into a contract of seller and buyer for the purpose of settling the damages for the breach of duty of the agent.

Now, by sect. 38 (2) of the Sale of Goods Act, 1893, the rights of an unpaid seller as defined by that Act (*d*) extend to a person *in the position of a seller*, "as, for instance, a consignor or agent who has himself paid, or is directly responsible for, the price."

It is now proposed to refer in detail to the rights and obligations of the parties under the c.i.f. contract under the following headings: shipment; insurance; tender of documents; payment; remedies.

(*d*) See *post*, p. 163.

CHAPTER II.

OF SHIPMENT.

THE seller under a c.i.f. contract (*a*) has to ship at the place of shipment, within the time named in the contract or within a reasonable time, goods of the contractual description and to procure on shipment a contract of affreightment under which the goods will be delivered at the destination provided by the contract (*b*).

The transit. The transit contemplated by c.i.f. contracts is generally, but not necessarily, by sea alone. Frequently these contracts involve some land transit (*c*) as, for instance, contracts for the sale of cotton to be exported from the United States, which are usually carried out by means of through bills of lading from the interior. There, shipment generally takes place when the goods are put on the railroad and the seller receives from the railroad authorities a through bill of lading covering both the land and the sea transit. Similarly, goods may

(*a*) Unless he fulfils his contract by purchasing goods afloat and tendering the documents in respect of them to the buyer. This he is entitled to do unless the contract requires that he should actually ship the goods.

(*b*) See *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 214, at p. 220, *ante*, p. 12; *ibid.* at p. 955, *ante*, p. 15; (1912) A. C. 18; *Johnson* v. *Taylor Bros.*, (1920) A. C. 144, at pp. 149, 155, *ante*, p. 23; *Landauer & Co.* v. *Craven & Speeding Bros.*, (1912) 2 K. B. 94, at p. 105, *ante*, p. 13; *Hansson* v. *Hamel & Horley, Ltd.* (1920), 26 Com. Cas. 107; C. A. *ibid.* 236; H. L., (1922) 2 A. C. 36, *post*, p. 34.

(*c*) For example, see *Burstall* v. *Grimsdale* (1906), 11 Com. Cas. 280. As to through bills of lading, see Scrutton on Charter-parties, 11th ed., Art. 22.

be shipped under a c.i.f. contract into the interior of the country, *e.g.*, c.i.f. Leeds (*d*).

But if there is an express provision as to "shipment" in an English contract, "shipment" means the loading of the goods on to a ship; and evidence that by the custom of a particular trade it means loading into railway cars in the interior of the country is inadmissible, as such construction would be inconsistent with the express term of the contract (*e*). Thus in *Mowbray, Robinson & Co.* v. *Rosser* (*f*), where a contract was made in England through American sellers' broker for the sale of American timber, "*shipment* to be made not later than the end of November next," and the English buyers refused to carry out the contract because (*inter alia*) the goods had not been shipped by the specified date, it was unsuccessfully contended by the sellers that by the custom of the trade in America "shipment" meant loading on railroad cars or loading on cars at the saw mills from which the timber comes. In an English contract "shipment" means putting on board ship, unless the sense is varied by other terms of the contract.

Transhipment.

When there is no direct means of shipment from the place where the goods are to be shipped to the destination contemplated by the contract, and it is, therefore, necessary to tranship the goods in the course of the transit, commercial practice appears to vary. The seller generally makes arrangements, on or prior to shipment on the local vessel, with the shipowner who is to perform the greater part of the transit, whereby either the latter

(*d*) As in *Johnson* v. *Taylor Bros.*, (1920) A. C. 144.

(*e*) "To fall within the exception of repugnancy (the custom) must be such as, if expressed in the written contract, would make it insensible or inconsistent." *Per* Lord Campbell, C.J., *Humphrey* v. *Dale* (1857), 7 E. & B. 266, at p. 275. "I accept and agree with this test." *Per* Lord Birkenhead, L.C., *Palgrave, Brown & Co.* v. "*Turid*," (1922) 1 A. C. 397, at p. 406.

(*f*) (1922), 91 L. J. K. B. 524 (C. A.).

allows the master of the local vessel, or authorises his own agent at the port of shipment, to sign a through bill of lading for the whole transit, or as soon as the goods are shipped on the local vessel the bill of lading is forwarded to the shipowner who has to undertake the main part of the transit, and the latter, on receipt of the bill of lading, issues his through bill of lading. If the necessity for transhipment occurs in the later part of the transit, a through bill of lading for the whole transit is obtained on shipment on the ocean steamship.

The question whether, in a particular case of transhipment, the seller has fulfilled his obligation to procure a contract of affreightment (i) on shipment and (ii) of such a character that, on transfer to the buyer, it gives the buyer the right to sue the shipowner, if necessary, in respect of the transit, may involve some difficulty. It has been discussed in three cases to which it is now proposed to refer: *Cox, McEuen & Co.* v. *Malcolm & Co.*, *Landauer & Co.* v. *Craven & Speeding Bros.*, and *Hansson* v. *Hamel & Horley, Ltd.*

In *Cox, McEuen & Co.* v. *Malcolm & Co.* (*g*) the contract was for the sale, c.i.f., of 500 bales of manila hemp to be shipped from a recognised shipping port or ports in the Philippine Islands or from Hong-Kong or Singapore, by steamer or steamers, direct or indirect, to London between August 1st and September 30th, 1909, both inclusive, declaration to be made with due despatch not later than sixty days from bill of lading. The sellers shipped 500 bales of manila hemp from Manila to Hong-Kong within the contract time, taking bills of lading to the order of themselves. On the 23rd October the hemp was transhipped at Hong-Kong, fresh bills of lading being taken for carriage to London. The last-mentioned bills of lading were in due course presented to the buyers, but the buyers refused to take them up on the grounds

(*g*) (1910), reported (1912) 2 K. B. 107, n.

that the goods had not been shipped to London directly or indirectly between August 1st and September 30th, 1909, and that the date of the Hong-Kong bills of lading was conclusive as fixing the 23rd October as the date of the actual shipment of the goods. An arbitration took place and the matter came before Hamilton, J., on a special case stated by the arbitrator. The arbitrator found that it was usual that hemp from the Philippine Islands destined for London should be transhipped at Hong-Kong, and that it was usual, but not in his opinion essential, that such hemp should be shipped on through bills of lading, and he awarded that the sellers had fulfilled the contract. Hamilton, J., upheld the award. "In my opinion," he said (*h*), "the contract does not require in order that a shipment may be made from Manila indirect to London that there shall be a through bill of lading or a bill of lading stating on its face that the shipment to the intermediate port is for the purpose of transhipment by the carrier to a London steamer. It seems to me that the goods are in fact shipped indirect to London when the person who is entitled to control them, namely, the shipper and holder of the bill of lading, does in fact intend when he ships them at Manila to tranship them at Hong-Kong for delivery in London, and in fact carries out that intention, which is the case here. There may be very good reasons for preferring that the bill of lading should be a through bill of lading and that the Manila bill of lading should state that it is for transhipment and so preclude the shipper from having any opportunity of taking delivery of the goods at Hong-Kong and so diverting or detaining them; but I think that if that is desired it must be the subject of express stipulation."

In *Landauer & Co.* v. *Craven & Speeding Bros.* (*i*) the contract was in the same form and the material facts

(*h*) (1910), reported (1912) 2 K. B. 107, n., at p. 110.
(*i*) (1912) 2 K. B. 94.

were similar, but the arbitrator had found that by mercantile custom a seller c.i.f. must obtain on shipment a through contract of affreightment to the ultimate destination. This finding enabled Scrutton, J., to distinguish the case from that just cited, but on the general question he differed from Hamilton, J. In the course of his judgment he said (*k*): "If when he (the seller) ships goods sold c.i.f. London he has no contract for carriage to London, but only an intention to make one, he cannot forward this and tender an intention to the buyer; and in cases where the buyer is near at hand this may delay him in selling and getting his money, for the buyer frequently wants, not to take delivery of the goods, but to sell them afloat to other people; and but for the decision of Hamilton, J., I should have thought that the seller c.i.f. must ship his goods under a contract for conveyance to the port of destination which can be transferred, not under a contract for part of the way and an intention to make another which cannot be transferred, which, as in this case, may not become effective for three months. I should have been disposed to read the words of the contract: 'shipment at the port in one or more steamers which are going to London direct or indirect,' or, at any rate, 'shipment to London, that is, under a contract to carry to London either direct by the same steamer, or indirect by transhipment to another steamer,' in other words, under a through bill of lading, which is found by the arbitrator to be the usual method of forwarding." There was another point taken in the case by the buyers, namely, that the documents tendered included only the bill of lading from Hong-Kong and not the bill of lading from Manila to Hong-Kong. As to this the learned judge, after stating that the point could have been but was not taken in the case of *Cox, McEuen & Co.* v. *Malcolm & Co.* (*l*), and that it was a good point,

(*k*) *Ibid.* at p. 105.
(*l*) *Ubi Supra.* Lord Sumner, however, says, in *Hansson* v. *Hamel &*

said (*m*): "The buyer wants the bill of lading for two purposes: firstly, to take delivery, for which purpose the Hong-Kong bill of lading will suffice; secondly, to claim on the shipowner for any breach of the contract of affreightment. As Blackburn, J., said in *Ireland* v. *Livingston* (*n*): 'Should the goods not be delivered in consequence of a peril of the sea, he is not called upon to pay the freight, and he will recover the amount of his interest in the goods under the policy. If the non-delivery is in consequence of some misconduct on the part of the master or mariners, not covered by the policy, he will recover it from the shipowner.' He therefore wants a policy and contract of affreightment covering the whole adventure. Supposing in this case transhipment had been at Hamburg, would it have been enough to tender the bill of lading from Hamburg to London? If the transfer of the bill of lading from Manila to Hong-Kong is necessary to enable the buyers to sue the shipowners, it should have been tendered; if, being spent, its endorsement will not have that effect, this is another argument in favour of the tender of one contract of affreightment of the whole voyage."

In *Hansson* v. *Hamel & Horley, Ltd.* (*o*), the plaintiff, a Swedish merchant, sold to the defendants, an English company, on c.i.f. terms 600 tons of Norwegian cod guano to be shipped from Norway to Japan during March-April, 1920. The guano was shipped in different parcels on a local steamer within the contract period at more than one Norwegian port. There was no direct connection between the ports of shipment and Japan, and therefore the shipment was made to Hamburg, where it

Horley, Ltd., (1922) 2 A. C. 36, at p. 49, that the form of the arbitrator's question prevented the buyers from raising this question in *Cox, McEuen & Co.* v. *Malcolm & Co.*

(*m*) (1912) 2 K. B. 94, at p. 106.

(*n*) (1872), L. R. 5 H. L. 395, at p. 407.

(*o*) (1920), 26 Com. Cas. 107; *ibid.* 236 (C. A.); (1922) 2 A. C. 36.

was intended to tranship into a Japanese steamer for carriage direct to Japan. The seller arranged with the agent of the Japanese steamer at Hamburg that the latter should issue through bills of lading in respect of the goods as soon as they came into his possession. Accordingly, on May 5th, that is, after the expiration of the time limited for shipment and thirteen days after the date of the local bill of lading, the agent at Hamburg issued to the seller so-called through bills of lading showing that the goods had been transhipped at Hamburg. The bills of lading were in the following form: The document was headed "Through Bill of Lading," and contained in the margin "from Braatvag (the original port of shipment in Norway) to Yokohama," and "shipped from Braatvag according to bill of lading on the 22nd April, 1920," and began thus: "Shipped in apparent good order and condition by Messrs. Hamel & Horley, Ltd., on board the steamship 'Kiev' (the local steamer) lying in or off the port of Braatvag and bound to Hamburg for transhipment into the Osaka Shosen Kaisha's Steamship 'Atlas Maru' . . . 1,500 bags cod guano . . . to be delivered . . . at the port of Yokohama . . . unto 'order.'" The seller tendered to the buyers shipping documents which included these bills of lading, but the buyers declined to pay on the ground that the bills of lading were not in order and did not cover the whole transit from Norway to Japan, but only the transit between Hamburg and Japan. Bailhache, J., held that the seller had made two contracts which together covered the whole voyage from Norway to Japan, and, secondly, that where, as in that case, a voyage was not continuous and it was the practice to issue the through bill of lading at the port of transhipment, a seller under a c.i.f. contract fulfilled his obligation if he forwarded the bill of lading to the buyer within a reasonable time after its issue at the port of transhipment. He accordingly gave judgment for the seller.

The Court of Appeal (Bankes, Warrington and Atkin, L.JJ.) reversed this decision on the ground that the bills of lading were not such documents as the buyers were bound to accept under a c.i.f. contract, since they were not issued on shipment or within the time limited for shipment. The Court did not decide, though it doubted, whether in other respects the bills of lading issued at Hamburg constituted good through bills of lading for tender to the buyers under the contract. "These goods," said Bankes, L.J. (*p*), "were shipped at the port of shipment within the contract time, but the question is whether the seller did procure a contract of affreightment on shipment. What is meant by a contract of affreightment? In my opinion, to satisfy the requirements with reference to a contract of affreightment the seller must bring into existence a contract embodied in a form capable of being transferred to the buyer and which when transferred will give the buyer two rights, (a) a right to receive the goods, and (b) a right against the shipowner who carries the goods should the goods be damaged or not delivered. If that is a correct view of what is meant in this case and in other cases by a contract of affreightment no such contract ever came into existence on shipment or within the period fixed by the contract for shipment."

Atkin, L.J., added the following observations on commercial practice in cases of transhipment (*q*): "C.i.f. contracts can be, and are, properly carried out in accordance with commercial practice by transhipment, and the Courts are not in the least likely to interfere with that commercial practice. The objection here is that the practice adopted does not conform to that which is necessary and can well be adopted for the purpose of strictly carrying out the terms of a c.i.f. contract. The actual practice proved by the witnesses as applicable to such a

(*p*) 26 Com. Cas. at p. 239.
(*q*) *Ibid.* at p. 245.

case as this does not appear to have been adopted in this particular case. It is undoubtedly of the essence of such a contract as this that the buyer should be put as soon as reasonably possible in possession of the documents that represent the goods, for the obvious reason that he desires to dispose of them in the ordinary course of commerce as soon as he can. The practice as proved appears to me to be this: the owner of the ocean-going ship who has to perform the greater part of the transit will, on a proper contract having been made with him at or before the time of shipment, either allow the master of the local vessel to sign a through bill of lading or will authorise his accredited agent at the port of loading to sign a through bill of lading; or if he is not able to do that will as soon as he receives the bill of lading for the goods in the local ship issue his through bill of lading. . . . but in this case nothing of the kind was done. The owner of the ocean-going vessel refused to issue a through bill of lading until the goods had actually arrived at Hamburg, and that, it appears to me, must have caused a delay which was not contemplated by the contract."

The decision of the Court of Appeal was affirmed in the House of Lords (*r*). It was there clearly laid down that the seller under a c.i.f. contract has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination. The ocean bill of lading afforded no protection to the buyer in the interval of thirteen days which elapsed between the dates of the local bill of lading and the ocean bill of lading. It was further held that a bill of lading issued thirteen days after original shipment at another port was not procured "on shipment."

Lord Sumner, who delivered the principal judgment, in the course of it (*s*) said: "These documents have to be

(*r*) Lords Buckmaster, Atkinson, Sumner, Wrenbury and Carson, (1922) 2 A. C. 36.

(*s*) *Ibid.* at p. 46.

handled by banks, they have to be taken up or rejected promptly, and without any opportunity for prolonged enquiry; they have to be such as can be retendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce. I am quite sure that, under the circumstances of this case, this ocean bill of lading does not satisfy these conditions. It bears notice of its insufficiency and ambiguity on its face, for though called a through bill of lading, it is not really so. It is the contract of the subsequent carrier only, without any complementary promises to bind the prior carriers in the through transit . . . the buyer was plainly left with a considerable *lacuna* in the documentary cover to which the contract entitled him.

"The point is also put in a slightly different way, which equally relates especially to bills of lading. Scrutton, J., points out in *Landauer & Co.* v. *Craven* (*t*), that in a sale of goods c.f. and i. the contract of affreightment must be procured 'on shipment.' Of course, this is practicable and common even when a through bill of lading is necessary, containing provision for transhipment at an intermediate port from a local to an ocean steamer not in the same ownership. I do not understand this proposition as meaning that the bill of lading would be bad, unless it was signed contemporaneously with the actual placing of the goods on board. 'On shipment' is an expression of some latitude. Bills of lading are constantly signed after the loading is complete, and, in some cases, after the ship has sailed. I do not think that they thereby necessarily cease to be procured 'on shipment,' nor do I suppose that the learned judge so intended his words. It may also be that the expression would be satisfied, even though some local carriage on inland waters, or by canal, or in an estuary by barge or otherwise, preceded the shipment on

(*t*) (1912) 2 K. B. 94, *ante*, p. 13, n. (*g*).

the ocean steamer, provided that the steamer's bill of lading covered that prior carriage by effectual words of contract. 'On shipment' is referable both to time and place. In principle, however, and subject to what I have said, I accept this opinion of so great an authority, and I am quite sure that a bill of lading only issued thirteen days after the original shipment, at another port in another country many hundreds of miles away, is not duly procured 'on shipment.' Indeed, the ocean bill of lading was not procured as part of this c.f. and i. shipment at all, and 'on shipment' does not at any rate mean on reshipment or on transhipment."

He explained his decision in *Cox, McEuen & Co.* v. *Malcolm & Co.* (*ante*, p. 31), on the ground that the issue there was limited by the findings and questions of the arbitrator, and did not turn on any question of the shipping documents required by c.i.f. terms in general.

The route.

In the absence of express terms in the contract the customary or usual (*u*) route must be followed. An usual route need not be the invariable route. In one case (*v*) a route followed in one-half of the recorded cases was held to be an usual or customary route. When, therefore, there is more than one usual route, shipment by any of such usual routes will satisfy the seller's obligation. If, however, a particular route is designated by the contract it must be followed.

The case of *In re Sutro & Co. and Heilbut, Symons & Co.* (*x*) affords an illustration of the risk incurred by the seller unless the route prescribed by the contract is strictly adhered to. In that case a contract made in 1916 for the sale of rubber c.i.f. provided that it was to be

(*u*) *I.e.*, a route followed by settled and established practice. Cf. *per* Lord Blackburn, *Postlethwaite* v. *Freeland* (1880), 5 A. C. 599. at p. 616.

(*v*) *Evans & Co.* v. *Cunard S.S. Co.* (1902), 18 T. L. R. 374. And see *per* Scrutton, L.J., *In re L. Sutro & Co. and Heilbut, Symons & Co.*, (1917) 2 K. B. 348, at p. 363.

(*x*) (1917) 2 K. B. 348 (C. A.).

shipped "by vessel or vessels (steam or motor) from the East to New York direct and/or indirect, with liberty to call and/or tranship at other ports." Shipment was to be declared to the buyers. The sellers made a declaration under the contract of 15 tons as having been shipped per steamship *via* Seattle under a through bill of lading, which stated that the goods were shipped at Singapore for New York *via* Seattle, a port on the Pacific coast of the United States, whence they would be sent on by rail to New York. The buyers objected to this declaration on the ground that under the contract the rubber was to be conveyed by sea to New York. The dispute went to arbitration. The arbitrators found that owing to the difficulty experienced in obtaining freight space from the East to the Eastern ports of the United States arising from the European War, shipments which theretofore had been made all the way by water began in October, 1915, to be made by steamer to a Western port of the United States, and thence by rail to the destination, and that such route had become one of the usual routes for rubber sold on contracts such as that in question; and they held that the tender was good. The Court of Appeal (Swinfen Eady, L.J., and Bray, J., Scrutton L.J., dissenting), affirming Lush, J., held that the usage (assuming it was an usage) found by the arbitrators was inconsistent with the terms of the contract, and therefore not applicable, and the buyers' objection was sound. Scrutton, L.J., was of opinion that the arbitrator's finding as to the route being one of the usual routes was conclusive, not the less so because the usage had sprung up in a short time—"war time methods of business alter and crystallize very rapidly"—and that the usage was not excluded by the particular terms of the contract.

Steamer or sailer.

If the contract specifies that shipment is to be on a steamer or on a sailing vessel (*y*), the stipulation must be

(*y*) *E.g.*, "by sailer or sailers." *Ashmore* v. *Cox*, (1899) 1 Q. B. 436, *post*, p. 58.

complied with. If there is no provision, or a neutral term, such as vessel, is used, the seller satisfies his obligation by shipping on the kind of vessel by which similar goods are in practice shipped (*z*), the test being whether the bill of lading by steamer or sailing vessel, as the case may be, is the usual bill of lading in the trade.

The terms of the contract of affreightment.

The contract of affreightment which the seller has to obtain must be a reasonable contract. The Sale of Goods Act, 1893, s. 32, sub-s. (2) provides that "Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable, having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages." The obligation to make a reasonable contract of carriage is implicit in the contract, and does not depend upon any agency or trust on the part of the seller for the buyer. "There is no agency or trust between them," says Blackburn, J., in *Ireland* v. *Livingston* (*a*). But "it may well be," said Lord Atkinson in delivering the judgment of the Privy Council in *Houlder Bros. & Co., Ltd.* v. *Public Works Commissioner* (*b*), "that under a normal c.i.f. contract, the vendor who *charters a ship* for the carriage of the goods sold acts in so doing as the agent of the consignee, and, in the absence of any special agreement between them, is, under sect. 32, sub-sect. (2) of the Sale of Goods Act, 1893 (*supra*), bound to make a reasonable contract in that regard."

The obligation is satisfied if the contract of carriage is in a form current in the trade or on the contemplated

(*z*) *E.g.*, shipment by steamer in the basic slag trade. *Ranson, Ltd.* v. *Manufacture D'Engrais* (1922), XIII. Lloyd's List L. R. 205.

(*a*) (1872), L. R. 5 H. L. 395, at p. 407. *Contra* where the consignor is a buying agent. See *ibid.*

(*b*) (1908) A. C. 276, at p. 290.

route. The seller is not called upon to procure a contract on more favourable terms than those usually contained in the ordinary bill of lading in use in the trade or on the route concerned. In any given case the test to be applied is whether it is in accordance with the usage and practice in the trade to carry goods of the contractual description shipped from and to the places in the contract under a contract of carriage such as that in question. Thus in *Burstall* v. *Grimsdale* (*c*) the contract was for the purchase of 200 tons of maize germ meal c.i.f. London for despatch from mills during December, 1905, thence to be shipped per steamer and/or steamers from American port and/ports, all other conditions as per the American maize germ meal contract. The meal was forwarded from an inland town under through bills of lading issued by the Railroad Co. in the customary form providing for the carriage of the maize to New Orleans and thence by the Leyland Line to London, subject to all the terms of the bills of lading in regular use by the Line at the time of shipment. The regular form of Leyland bill of lading reserved liberty to proceed "*via* any other port or ports in any order or rotation, outwards or forwards, whether in or out of or in a contrary direction to or beyond the customary or advertised route," and also gave power to tranship the goods at any port. The steamer carrying the goods in fact deviated to Bremen before reaching London and delay occurred. The buyers refused to take up the documents on the ground that the steamer was calling at Bremen before proceeding to London, and the tender was, therefore, not in accordance with the contract of sale. The trade tribunal to which the matter was referred decided against the buyers, finding that the documents were usual and customary, in forms well known in the trade and received without objection in fulfilment of similar contracts of sale. It

(*c*) (1906), 11 Com. Cas. 280.

was held by Kennedy, J., on these findings that the documents tendered were not necessarily inconsistent with the terms of the contract of sale and the buyers were not justified in their action: "If the effect of the clause in the bill of lading," he said (*d*), "is to make the calling at another port, such as at Bremen, out of the direct line to London permissible, the question then is, was the adoption by the shippers under the through bill of lading of such a method of carriage by the Leyland Line—a well known line of steamers—necessarily inconsistent with the terms of the sale contract and the American germ meal contract which it embodies? That appears to be eminently a question of fact or commercial usage, and upon the findings in this case it seems to me that there was no inconsistency. If I were trying this case as an action before a jury, the question I should have to ask the jury would be whether it is or is not the usage and practice in the trade to accept this method of carriage to London under a contract such as this, and is such custom or practice or usage well known and acted upon? I feel no doubt—in fact it is found for me—that that question would be answered, as it has been in this case, in the affirmative."

In *Shipton, Anderson & Co.* v. *Weston & Co.* (*e*), where the contract of sale called for shipment from Atlantic or Canadian ports with option of calling at another port in the United Kingdom to Bristol and Avonmouth or Portishead, direct or indirect, sellers' option, and the vessel called at Glasgow and then at Belfast before proceeding to Avonmouth under liberties contained in the bill of lading "so wide that the ship might have called anywhere she liked and almost have gone round the world before she came to the port of discharge," Greer, J., held that tender of the bill of lading was not a good tender under the contract.

(*d*) *Ibid.* at p. 290.
(*e*) (1922), X. Lloyd's List L. R. 762.

In *Fischel & Co.* v. *Spencer* (*f*) the contract was for the sale of Manila copra cakes to be shipped per steamer or steamers from port or ports in the Philippine Islands c.i.f. Rotterdam. The bill of lading procured by the sellers was in the usual form adopted by the four shipping companies which carried the bulk of the trade from the islands: it provided for *transhipment* from steamer to steamer, sailing vessels or lighters. On arrival at London the goods were discharged into lighters and put upon a vessel for Amsterdam where they were again put on board lighters and carried to Rotterdam. The buyer refused the tender of the bill of lading by reason that the goods had been transhipped. The Court (Lord Hewart, C.J., Bailhache and Salter, JJ.), on a case stated by trade arbitrators held that it was bound by a finding of fact in the case that where a seller desires to have power to tranship it is usual and customary for him to insert in the contract a clause authorising transhipment, and since the contract contained no such provision the bill of lading was not a good tender.

Demurrage.

The terms of the contract of sale may entitle the seller to make a profit on the carriage of the goods sold. This may occur where there is a demurrage clause in the contract of sale. "There is no rule of law that a vendor in a c.i.f. contract may not secure for himself a profit under a demurrage clause contained in it. Neither is there any indisputable presumption of law that the parties to such a contract did not intend that he should receive such a profit. To use the words of Lord Blackburn in *Calcutta and Burmah Steam Navigation Co.* v. *De Mattos* (*g*), in such contracts "there is no rule of law . . . preventing the parties making any bargains they please" (*h*). Thus, in *Houlder Bros. & Co., Ltd.* v.

(*f*) (1922), XII. Lloyd's List L. R. 36.
(*g*) (1863), 32 L. J. Q. B. 322, at p. 328.
(*h*) *Houlder Bros. & Co., Ltd.* v. *Commissioner of Public Works*, (1908) A. C. 276, at p. 291 (P. C.).

Commissioner of Public Works (*i*), where the judgment of the Privy Council contained the passage just quoted, the contract was for sale of certain quantities of coal c.i.f. Capetown and Port Elizabeth and contained a demurrage clause binding the buyer to accept delivery to the railway authorities immediately on arrival of the coal in port at certain rates per day or pay demurrage "at 4*d*. per net registered ton per day for sailers and 6*d*. per net registered ton per day for steamers." The contract, it is to be observed, contained no reference to a charterparty. The sellers entered into charterparties for the carriage of the coal which was in due course delivered. In the events which happened the sellers became liable to pay demurrage under the charterparties, but the amount payable thereunder was less than the demurrage payable by the buyer under the contract of sale. The sellers sought to recover the larger sum from the buyer. It was held upon the words of the contract, as also in view of the conduct, mode of dealing and antecedent course of business between the parties that the term in the contract of sale as to demurrage was an absolute and not a mere indemnity contract on the part of the buyer, and therefore the sellers were entitled to recover from the buyer the full amount of demurrage stipulated in the contract and not merely an amount equal to the sum which they had been compelled to pay to the shipowner under the charterparties. The contract, however, was not a normal c.i.f. contract, payment of part of the price being conditional on delivery at the destination, and was not treated as such, and the facts relating to the conduct and dealings of the parties were peculiar to the case; for example, the buyer until trial never challenged, on the contrary "in letter after letter expressly admitted," the sellers' construction of the contract.

Houlder's Case was distinguished in *Suzuki* v. *Com-*

(*i*) (1908) A. C. 276 (P. C.).

panhia Mercantile Internacional (*k*) where the c.i.f. contract of sale contained a demurrage clause in the following form: The rice to be discharged at Lisbon, discharge to be at the rate of 500 tons per day. Demurrage as per *charterparty* or freight agreement. The Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), affirming the decision of Shearman, J., held that the buyers had only undertaken to indemnify the sellers against any demurrage which they (the sellers) were liable to pay under the charterparty which they had entered into. "In the *Houlder Bros.' Case,*" said Bankes, L.J., "the contract was of a very special character. It contained no reference at all to the charterparty, and there was in addition a course of business between the parties which was proved and which was relied upon in the Privy Council, and was a matter taken into consideration in arriving at what the proper construction was. I do not think that decision has any authority for the construction which should be put upon the contract in this case."

On the other hand, in the case of the *French Government* v. *Sanday & Co.* (*l*), where the contract of sale of a cargo of wheat ex "Guernsey" contained in a letter included the words "discharge 500 tons per day, time to count 24 hours after arrival, demurrage at the rate of 200*l.* per day," Bailhache, J., held, following *Houlder's Case,* that the words quoted were words of contract and not of indemnity, and that the sellers were entitled to recover demurrage at the stipulated rate from the buyers. There were three alternatives, it was said. Firstly, it was said that the words were merely words of intimation as to what the bills of lading would contain; but "commercial men in making contracts of this kind do not give each other pieces of news." Secondly, it was argued that if that was not so, the contract was one of indemnity, that it should be read, "if we have these terms imposed upon us (the

(*k*) (1921), VIII. Lloyd's List L. R. 174; C. A., IX. *ibid.* 171.
(*l*) (1923), XVI. Lloyd's List L. R. 238.

sellers), you must indemnify us against any liability that we have become under in consequence of it." But "it seems to me," said the learned judge (*m*), "quite clear that they are not words of indemnity. The third alternative remains, they must be words of contract, and I, for myself, should have come to that conclusion without any authority that these are clear words of contract. I am confirmed in that by the case of *Houlder Bros.*"

Bill of lading is necessary.

As we have seen, the seller under a c.i.f. contract must procure a bill of lading for tender to the buyer. A delivery order or a ship's release will not suffice unless the contract expressly so provides (*n*). Neither document complies with the requirements (i) that the buyer is entitled to a bill of lading issued on shipment, and (ii) that he is entitled to a document which will give him a right of action against the shipowner from the time the goods were shipped until the time when they were discharged. In *Heilbut, Symons & Co., Ltd.* v. *Harvey & Co.* (*o*), some evidence was given that in the rubber trade, where a shipment under a bill of lading is split up and sold to two (or more) buyers, a practice has grown up whereby one of the buyers is given the bill of lading and the other buyer gets a ship's release, and if he requires it in addition, a satisfactory guarantee to hold him harmless against any consequences arising from taking the delivery order. In the particular case a ship's release was tendered without a guarantee, and Bailhache, J., held that it was not a good tender. He did not decide whether a ship's release with a guarantee would be a good tender, but it is conceived that on principle the same objection would prevail.

What is a bill of lading for the purposes of a c.i.f. contract?

The question has been raised recently as to what is meant by a bill of lading within a c.i.f. contract, namely, whether a receipt for goods not actually shipped but *to*

(*m*) *Ibid.* at p. 240.

(*n*) *E.g.*, as to delivery order, *Denbigh, Cowan & Co.* v. *Atcherley & Co.* (1921), 90 L. J. K. B. 836, *post*, p. 88.

(*o*) (1922), XII. Lloyd's List L. R. 455.

be shipped at a future time, though otherwise in the form of an ordinary bill of lading, is a bill of lading within a c.i.f. contract. In *The ship "Marlborough Hill"* v. *Alex. Cowan & Sons, Ltd.* in the Privy Council (*p*), it was decided that a receipt for goods in the following form was a bill of lading for the purposes of the Admiralty Court Act, 1861, s. 6 (*q*): "Received in apparent good order and condition from —— for shipment" by the sailing vessel called the "Marlborough Hill," or by some other vessel owned or operated by the Commonwealth and Dominion Line Limited, Cunard Line, Australasian Service. It contained a provision to the effect that the shipowner might substitute or tranship the whole or any portion of the goods by any other prior or subsequent vessel at the original port of shipment or at any other place. It was signed by agents for the master of the "Marlborough Hill," and admitted the obligation to carry and deliver.

The following extracts from the judgment sufficiently explain the grounds upon which the decision as to the effect of the document was based (*r*). "It is a matter of commercial notoriety . . . that shipping instruments which are called bills of lading, and known in the commercial world as such, are sometimes framed in the alternative form 'received for shipment' instead of 'shipped on board,' and further, with the alternative contract to carry or pro-

(*p*) (1921) 1 A. C. 444 (P. C.) (Viscount Cave, Lords Dunedin, Moulton and Phillimore).

(*q*) 24 & 25 Vict. c. 10. The material provision of sect. 6 is as follows: "The High Court of Admiralty shall have jurisdiction over any claim by the owner, consignee or assignee of *any bill of lading* of any goods carried into any port in England or Wales in any ship, for any damage done to the goods or any part thereof by the negligence or misconduct of or for any breach of duty or breach of contract on the part of the owner, master, or crew of the ship, unless it is shown to the satisfaction of the Court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales."

(*r*) (1921) 1 A. C. 451-453.

cure some other vessel (possibly with some limitations as the choice of the other vessel) to carry, instead of the original ship. It is contended, however, that such shipping instruments, whatever they may be called in commerce or by men of business, are nevertheless not bills of lading within the Bills of Lading Act, 1855 (*s*), and it is said, therefore, not bills of lading within the meaning of the Admiralty Court Act, 1861." But this was too narrow a view of a commercial document. "There can be no difference in principle between the owner, master, or agent acknowledging that he has received the goods on his wharf, or allotted portion of the quay, or his storehouse awaiting shipment, and his acknowledging that the goods have been actually put over the ship's rail. The two forms of a bill of lading may well stand together. The older is still the more appropriate language for whole cargoes delivered and taken on board in bulk; whereas 'received for shipment' is the proper phrase for the practical business-like way of treating parcels of cargo to be placed on a general ship which will be lying alongside the wharf taking in cargo for several days, and whose proper stowage will require that certain bulkier or heavier parcels shall be placed on board first, while others, though they have arrived earlier, wait for the convenient place and time of stowage.

"Then as regards the obligation to carry either by the named ship or by some other vessel; it is a contract which both parties may well find it convenient to enter into and accept. The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading; and if the contract begin when the goods are received on the wharf, substitution does not differ in principle for transhipment.

"If this document is a bill of lading, it is a negotiable instrument. Money can be advanced upon it, and busi-

(*s*) See *ante*, p. 3, n. (*e*).

ness can be done in the way in which maritime commerce has been carried on for at least half a century, throughout the civilised world. Both parties have agreed to call this a bill of lading; both, by its terms, have entered into obligations and acquired rights such as are proper to a bill of lading. All other incidents in its very detailed language are such as are proper to such a document." The several clauses of the document similar to those usually contained in an ordinary bill of lading were then referred to.

"It should perhaps be added that it is evidently contemplated by the document that the shipper will assign his rights and that the assignee or holder of the bill of lading will present the document at the port of delivery, and that his receipt and not that of the shipper will be the discharge to the shipowner."

It was therefore held that the document was a bill of lading within the Admiralty Court Act, 1861.

The question as to whether a document in similar form is a bill of lading for the purposes of a c.i.f. contract was discussed by McCardie, J., in *Diamond Alkali Export Corporation* v. *Fl. Bourgeois* (*t*). There the sellers of soda ash to be shipped from American seaboard c.i.f. Gothenburg tendered, and the buyer rejected, a document, purporting to be a bill of lading, in a similar form, namely: "Received in apparent good order and condition from . . . . to be transported by the s.s. "Anglia" . . . . or failing shipment by the said steamer in and upon a following steamer 280 bags Dense Soda." The buyer objected that the document was not a bill of lading at all and was not such a bill of lading as was required by the c.i.f. contract. McCardie, J., held that it was not a bill of lading within the contemplation of a c.i.f. contract. He considered

(*t*) (1921) 3 K. B. 443. See also *Droulias* v. *Christides* (1923), XIV. Lloyd's List L. R. 589, also *cor.* McCardie, J. The learned editors of Scrutton on Charterparties, 11th ed. art. 59, p. 192, n. (*h*), question the decision in the *Diamond Corporation Case*.

that the phrase "bill of lading" as used with respect to a c.i.f. contract meant a bill of lading in the established sense, that is to say, a document which acknowledged *actual shipment* on board the particular vessel, and that, as by the document in question the buyer was left in doubt as to actual shipment and the actual ship, it was not a document which he was bound to accept. With regard to the opinion of the Privy Council in the "*Marlborough Hill*" *Case* (*u*), he said: "I wish to point out first that the actual decision in the '*Marlborough Hill*' *Case* was merely that the bill of lading there in question (which closely resembles the one now before me) fell within sect. 6 of the Admiralty Court Act, 1861. It may be that the phrase 'bill of lading' in that section permits of a broad interpretation. I point out next that there is no express statement in the '*Marlborough Hill*' *Case* that the document there in question actually fell within the Bills of Lading Act, 1855 (*x*). In the third place it seems to me to be clear that the Board did not consider the nature and effect of an ordinary c.i.f. contract or the decisions thereon in relation to the question before them. The case of *Bowes* v. *Shand* (*y*), moreover, was not even cited to the Board. Lord Phillimore, in reading the advice of the Privy Council, said (*z*): 'There can be no difference in principle between the owner, master, or agent acknowledging that he has received the goods on his wharf, or allotted portion of quay, or his storehouse awaiting shipment, and his acknowledging that the goods have actually been put over the ship's rail.' With the deepest respect, I venture to think that there is a profound difference between the two, both from a legal and business point of view. The differences seem to me

(*u*) *Ante*, p. 48.

(*x*) *Sed quære.* See the passage cited *ante*, p. 49, in reference to the Bills of Lading Act.

(*y*) (1877), 2 A. C. 455. See *post*, p. 56.

(*z*) *Ante*, p. 49.

clear. I need not state them. If the view of the Privy Council is carried to its logical conclusion, a mere receipt for goods at a dock warehouse for future shipment might well be called a bill of lading. Again the Board say (*z*): 'Then as regards the obligation to carry either by the named ship or by some other vessel; it is a contract which both parties may well find it convenient to enter into and accept. The liberty to tranship is ancient and well established, and does not derogate from the nature of a bill of lading, and if the contract begin when the goods are received on the wharf, substitution does not differ in principle from transhipment.' I do not pause to analyse these words. I only say that in my humble view substitution and the right of transhipment are two distinct things, and rest on different principles. The passage last cited can, I think, have no application at all to a c.i.f. contract which provides for a specific date of shipment.

"It will suffice if I say two things: Firstly, that in my view the '*Marlborough Hill*' *Case* does not apply to a c.i.f. contract such as that now before me. Secondly, that grounds for challenging the *dicta* of the Privy Council will be found in Art. 22, and the notes and cases there cited, in Scrutton on Charterparties, 10th ed., as to what are called 'through bills of lading,' in the lucid article in the 'Law Quarterly Review' of October, 1889, Vol. V. p. 424, by Mr. Bateson, K.C.; and of July, 1890, Vol. VI. p. 289, by the late Mr. Carver; and in Carver on Carriage, 6th ed. notes to Sect. 107. I do not doubt that the document before me is a 'shipping document' within the U.S.A. Harter Act, 1893 (*a*). I feel bound to hold, however, that it is

(*z*) *Ante*, p. 49.

(*a*) The Act provides, by sect. 4: "That it shall be the duty of the owner or owners, master or masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise

not a bill of lading within the c.i.f. contract of sale made between the present parties."

But is not the question one of fact rather than of law? Is not the test to be applied whether it is or is not the usage or practice in the trade concerned to accept a bill of lading in the particular form in question and is such usage or practice well known and acted upon (*b*)?

The Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.), in two cases (*c*) of shipments of China peas from the East, appears to have regarded bills of lading describing the goods as "shipped or delivered for shipment" as good tenders under c.i.f. contracts. In one case (*d*) the form was stated to be "quite usual in the trade, not universal, but quite usual. It is the usual form adopted by the owners for this vessel, and it is a form which has come into use of recent years." In a third case arising out of the same shipment (*e*), it was said of bills of lading in that form, "they were in a form which we have held is usual in this trade" (*f*). "There is very good reason why it (the bill of lading) is framed in that way. The ship wants to have a bill of lading beginning with the time delivered for shipment, because

a *bill of lading or shipping document* stating, amongst other things, the marks necessary for identification, number of packages or quantity, stating whether it be the carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *primâ facie* evidence of the receipt of the merchandise therein described."

(*b*) Applying the language of Kennedy, J., in *Burstall* v. *Grimsdale* (1906), 11 Com. Cas. 280, at p. 290, cited *ante*, p. 43.

(*c*) *Weis & Co.* v. *Produce Brokers Co., Ltd.* (1921), VII. Lloyd's List L. R. 211; *United Baltic Corporation, Ltd.* v. *Burgett & Newsam* (1921), VIII. Lloyd's List L. R. 190.

(*d*) *Weis & Co.* v. *Produce Brokers Co., Ltd., ubi supra*, at p. 212, *per* Bankes, L.J.

(*e*) *Suzuki & Co.* v. *Burgett & Newsam* (1922), X. Lloyd's List L. R. 223 (Bankes, Atkin, and Younger, L.JJ.).

(*f*) *Ibid.* at p. 225, *per* Bankes, L.J.

it wants the time delivered for shipment covered by the exceptions. The shipper wants it in that form because he wants to be protected from the time he has given the goods into the hands of the ship for shipment" (*g*). It appears to be the fact, however, that in these cases no objection was taken by the buyers to bills of lading in this form as tender under their contracts; no doubt because that form was usual in the trade.

The present position therefore seems to be that until the decision of McCardie, J., in *Diamond Alkali Export Corporation* v. *H. Bourgeois* has been reviewed, except in trades where a bill of lading in the form under consideration has become usual, and, therefore, it is submitted, is a good tender, the validity of a tender of a bill of lading in that form is questionable.

The true view, it is submitted, is that in each case it is a question of fact whether the form of the bill of lading tendered is a form usual in the trade; if it is not, the buyer is not bound to accept it. But where the contract specifies a date for shipment, it means actual shipment, and the seller does not satisfy his obligation by producing a document which shows that the goods were "received for shipment" on the contract date (*h*); though, if he inserts in his contract the familiar term that the bill of lading is to be considered proof of date of shipment in the absence of evidence to the contrary, he throws the burden of proving the contrary on the buyer (*i*).

(*g*) *Per* Scrutton, L.J., *Weis & Co.* v. *Produce Brokers Co., Ltd., ubi supra,* at p. 215.

(*h*) As was the case in *Suzuki & Co.* v. *Burgett & Newsam, ubi supra,* where the contract was for a December/January shipment and the bill of lading describing the goods as "shipped or delivered for shipment" was dated the 31st January, but it was proved that the goods were not actually shipped until February. The buyers, who had taken up the documents and paid the price, were held to be entitled, on discovery of the true fact as to shipment, to recover the price paid.

(*i*) The buyer failed to discharge the onus in *Dewar & Webb* v. *Joseph Rank, Ltd.*, cited *post,* p. 59, n. (*u*).

Time and place of shipment.

Stipulations in the contract of sale as to time and place of shipment are ordinarily conditions precedent, and failure by the seller to comply with them entitles the buyer to refuse to accept the documents when presented. If no time for shipment is specified in the contract, the goods must be shipped within a reasonable time (*k*).

By sect. 10 (1) of the Sale of Goods Act, 1893, it is enacted that: "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract." But sect. 61 (2) preserves the rules of common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, and the common law and the law merchant in the absence of express terms in the contract, looked rather at the nature of the contract and the character of the goods sold than at the terms of the contract for determination of the question whether time was of the essence (*l*). In general, in mercantile contracts, as regards stipulations other than such as relate to time of payment, time is the essence of the contract.

In *Reuter* v. *Sala* (*m*), where a contract for the sale of pepper required the name of vessel or vessels, marks and particulars to be declared within sixty days, Cotton, L.J., said (*n*): "It was argued that the rules of Courts of Equity are to be regarded in all Courts, and that equity enforced all contracts though the time fixed therein for completion had passed. This was in the case of contracts, such as purchases and sales of land, where, unless a contrary

(*k*) See *per* Scrutton, J., *Landauer & Co.* v. *Craven & Speeding Bros.*, (1912) 2 K. B. 94, at p. 105.

(*l*) *Per* McCardie, J., *Hartley* v. *Hymans*, (1920) 3 K. B. 475, at p. 483.

(*m*) (1879), 4 C. P. D. 239 (C. A.).

(*n*) *Ibid.* at p. 249.

intention could be collected from the contract, the Court presumed that time was not an essential condition. To apply this to mercantile contracts would be dangerous and unreasonable. We must therefore hold that the time within which the pepper was to be declared was an essential condition of the contract."

In the well-known case of *Bowes* v. *Shand* (*o*), where contracts of sale of rice to be shipped at Madras during March and/or April, 1874, *per* "Rajah of Cochin," were held not to have been satisfied by shipments in February, Lord Cairns, L.C., said (*p*): "It is a mercantile contract, and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some value and importance, and that alone might be a sufficient answer. But, if necessary, a further answer is obtained from two other considerations. It is quite obvious that merchants making contracts for the purchase of rice, contracts which oblige them to pay in a certain manner for the rice purchased, and to be ready with the funds for making that payment, may well be desirous both that the rice should be forthcoming to them not later than a certain time, and also that the rice shall not be forthcoming to them at a time earlier than it suits them to be ready with funds for its payment. . . . There is still another explanation . . . these contracts were made for the purpose of satisfying and fulfilling other contracts made with other persons, and it is at least doubtful whether . . . a contract made in another form, or a contract made without this stipulation as to the shipment during these months, would have been a fulfilment of those other contracts which they desired to be in a position to fulfil." And Lord Blackburn said (*q*): "It was argued or tried to be argued, on one point, that it was enough that it was rice, and that it was immaterial when it was shipped. As far as the

(*o*) (1877), 2 A. C. 455.
(*p*) *Ibid.* at p. 463.
(*q*) *Ibid.* at p. 480.

subject-matter of the contract went, its being shipped at another and different time being (it was said) only a breach of a stipulation which could be compensated for in damages. But I think that is quite untenable. I think, to adopt an illustration which was used a long time ago by Lord Abinger, and which always struck me as being a right one, that it is an utter fallacy, when an article is described, to say that it is anything but a warranty (*r*) or a condition precedent that it should be an article of that kind, and that another article might be substituted for it. As he said, if you contract to sell peas, you cannot oblige a party to take beans. If the description of the article tendered is different in any respect it is not the article bargained for, and the other party is not bound to take it. I think in this case what the parties bargained for was rice, shipped at Madras or the coast of Madras. Equally good rice might have been shipped a little to the north or a little to the south of the coast of Madras . . . and probably equally good rice might have been shipped in February as was shipped in March, or equally good rice might have been shipped in May as was shipped in April, and I daresay equally good rice might have been put aboard another ship as that which was put on board the 'Rajah of Cochin.' But the parties have chosen, for reasons best known to themselves, to say: We bargain to take rice in this particular region, at that particular time, on board that particular ship, and before the defendants can be compelled to take anything in fulfilment of that contract it must be shown not merely that it is equally good, but that it is the same article as they have bargained for—otherwise they are not bound to take it."

A stipulation as to time of shipment, therefore, forms

(*r*) The term "warranty" is here used as strictly equivalent to condition precedent, and not, as it is used in the Sale of Goods Act, to contrast it with condition precedent. For a discussion of the definition of warranty, see Chalmers' Sale of Goods Act, 8th ed., p. 177.

part of the description of the goods sold, and as such, by sect. 13 of the Sale of Goods Act, 1893, is a condition of the contract: "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description." But it is more than part of the description of the goods; it is an independent condition precedent, as the following cases show:—

In *Ashmore* v. *Cox* (*s*) the contract was for the sale of 250 bales of Manila hemp c.i.f. shipment to be made from a port or ports in the Philippine Islands, by sailer or sailers, direct or indirect to London, between May 1st and July 31st, 1898. Owing to war it was impracticable to ship hemp from the Philippines between the dates specified. On September 15th the sellers shipped hemp, which as regards quantity and quality was in accordance with the contract, on a steamer which was expected to arrive at the same time as the hemp would have arrived if shipped on a sailer within the specified dates. The sellers declared this hemp under the contract. The buyers refused to accept the declaration and claimed damages for breach of contract, and Lord Russell of Killowen, C.J., held that they were right. "No doubt," he said (*t*), "there are a number of cases, all turning upon the particular contract, in which the Courts have held that certain stipulations, which did not go to the essentials of the contract, are not conditions precedent. But those cases do not, in my judgment, apply to the dates of shipment in the present contract, and I am inclined to think also they do not apply to the provision that shipment is to be made by sailer or sailers, on this short ground, that in the present contract the parties have chosen, by the very terms in which the stipulation appears, to make those events conditions precedent. They have said that the buyers shall not be called upon to

(*s*) (1899) 1 Q. B. 436.

(*t*) *Ibid.* at p. 441.

accept a shipment not in sailer or sailers, or not made between May 1st and July 31st. I therefore hold that these stipulations are conditions precedent."

In the case of *In re The General Trading Company, Ltd. and Van Stolk's Commissiehandel* (*u*) the contract was for the sale of beans c.i.f. Rotterdam in a form adopted by the London Corn Trade Association and contained the clauses: "Shipment made or to be made, and bill or bills of lading dated or to be dated during December, 1909, and/or January, 1910, . . ." and "bill of lading to be considered proof of date of shipment in the absence of evidence to the contrary." Bills of lading dated the 2nd February were tendered and rejected by the buyers as being later than the contract date. On the subsequent arrival of the ship at Rotterdam it was ascertained that the beans had in fact been shipped on January 30th and 31st and the documents were then again tendered to and rejected by the buyers. It was held by A. T. Lawrence, J., that the arbitrator was wrong in awarding that the contract had been fulfilled by the actual shipment in January, that the second clause did not qualify the first where the bills of lading did not bear the contract date, and that the buyers were entitled to have bills of lading of the contract date. Otherwise, "there could be no resale with any security.

(*u*) (1911), 16 Com. Cas. 95. This contract contained the common clause that the bill of lading is to be considered proof of date of shipment in the absence of evidence to the contrary; that is to say, the burden of proving that the goods were shipped at another date rests upon the party objecting. In one case where this clause appeared in the contract the shipper shipped 5,000 quarters of wheat under five bills of lading, all dated September 30th. The buyer bought 1,000 quarters, the bill of lading of which was to be dated in September. In fact, 3,000 quarters were put on board in September, the balance in October. The buyer failed to sustain his rejection because he could not show that the consignment tendered to him was shipped before or after midnight of the 30th September. *Dewar & Webb* v. *Joseph Rank, Ltd.* (1923), XIV. Lloyd's List L. R. 393 (C. A.).

The parties were not buying a litigation, or willing to take delivery of documents as a good delivery which forced a litigation upon them" (*x*). "It is admitted by Mr. Maurice Hill that he cannot dispute that shipment in the stipulated month is a condition. That was decided long ago when commerce was not so complicated as it is now, and it is because of the further developments as to resales, which are now constantly taking place, that the words as to the bills of lading are inserted and made part of the clause as to shipment" (*x*).

In the case of *Aron & Co.* v. *Comptoir Wegimont* (*y*), a contract of sale of cocoa powder c.i.f. Antwerp provided for "shipment by steamer and/or steamers . . . from U.S.A. ports during October, 1919," and it contained a clause that "whatever the difference of the shipment may be in value from the grade, type or description specified, it is understood that any such question shall not . . . entitle the buyers to reject the delivery or any part thereof, nor to refuse payment of the draft or drafts," but should be settled by arbitration. The goods were not shipped until November and the buyers rejected the documents when tendered. It was argued for the sellers that the date of shipment specified in the contract was part of the "description" of the goods and that therefore by virtue of the allowance clause in the contract, quoted above, the buyers were not entitled to reject. McCardie, J., said (*z*): "I agree in one sense the time of shipment is part of the description of the goods. Indeed in *Bowes* v. *Shand* (*a*), Lord Cairns said: 'That is part of the description of the subject-matter of what is sold.' So it is, I agree, in one sense, but in my humble view the express requirement of a contract that goods shall be shipped at a particular period is a good deal more than a

(*x*) (1911), 16 Com. Cas. 95, at p. 101.
(*y*) (1921) 3 K. B. 435.
(*z*) *Ibid.* at p. 440.
(*a*) (1877), 2 A. C. 455, 468, *ante*, p. 56.

mere description of the goods within sect. 13 of the Sale of Goods Act, 1893 [quoted *infra*]; it is an express term of the contract independent of that which is generally known as the description of the goods. It is, I think, a condition precedent . . . that the goods shall be shipped as required by the contract."

The extract from the judgment of Lord Blackburn in *Bowes* v. *Shand*, already quoted (*ante*, p. 57), shows that the place of shipment specified in the contract is equally a condition of the contract.

The goods shipped must correspond with the description.

In other respects the goods shipped must correspond with the description (*b*). The Sale of Goods Act, 1893, s. 13, enacts that: "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description (*c*); and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not correspond with the description."

There is a sale by description where the goods are described in the contract and the buyer contracts in reliance on that description. Since the buyer under a c.i.f. contract seldom sees the goods before the contract is entered into (*d*), practically all c.i.f. contracts are sales by description. Even if the buyer has seen the goods, the sale may still be a sale by description if the variation of the goods from the description was not apparent. The principle is nowhere more clearly stated than in the words of Lord Blackburn in *Bowes* v. *Shand*, already cited (*ante* p. 57): "If you contract to sell peas you

(*b*) See *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 214, at p. 220 (*ante*, p. 13).

(*c*) See *Bowes* v. *Shand, per* Lord Blackburn, *ante*, p. 56.

(*d*) "The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone." *Per* Channell, J., *Varley* v. *Whipp*, (1900) 2 Q. B. 513, at p. 516.

cannot oblige a party to take beans. If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it." And the extent of its application is well illustrated by the case of *Manbre Saccharine Co.* v. *Corn Products Co.* (*e*), where the contract was for the sale c.i.f. of starch in 280 lb. bags and the starch shipped was partly in 280 lb. bags and partly in 140 lb. bags. It was argued by the sellers that the words "280 lb. bags" were not a material part of the bargain, but McCardie, J., disagreed. He said (*f*): "It is clear that such words were an essential part of the contract requirements. They constitute a portion of the description of the goods. The size of the bags may be important to a purchaser in view of sub-contracts or otherwise. A man may prefer to receive starch in small or large or medium bags. If the size of the bags was immaterial I fail to see why it should have been so clearly specified in the contract. A vendor must supply goods in accordance with the contract description, and he is not entitled to say that another description of goods will suffice for the purposes of the purchaser."

Similarly, in the case of *In re Moore & Co. and Landauer & Co.* (*g*), a contract for the sale c.i.f. of cases of Australian canned fruits, each being described as containing thirty tins, was held by the Court of Appeal, affirming Rowlatt, J., not to have been satisfied by a tender of a consignment one half of which consisted of cases containing twenty-four tins only.

In another case (*h*) where the sale was of beans in bags per steamship "Luzo" "afloat," payment in London

(*e*) (1919) 1 K. B. 198.

(*f*) *Ibid.* at p. 207. This passage was adopted by Scrutton, L.J., in *In re Moore & Co. and Landauer & Co.*, (1921) 2 K. B. 519, at p. 524.

(*g*) *Ubi supra.*

(*h*) *Benabu & Co.* v. *Produce Brokers Co., Ltd.* (1921), 37 T. L. R. 609; C. A. *ibid.* ~~857~~ 851

by cash against documents on arrival of steamship, and, in fact, before the date of the contract the steamer had, without the knowledge of sellers or buyers, arrived and discharged the beans, the buyers took up the documents, and then, having discovered the fact of the vessel's arrival and discharge of the goods, claimed to reject. It was held that the word "afloat" was used in reference to the goods and was a condition of the contract, and the buyers were entitled to reject and recover the price paid by them.

Quantity.

The seller does not fulfil his contract if he ships a greater or less quantity of goods than he contracted to sell. By sect. 30 of the Sale of Goods Act, 1893: "(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he must pay for them at the contract rate. (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered he must pay for them at the contract rate." By sub-sect. (4) of the section, however, the provisions of the section are expressed to be "Subject to any usage of trade, special agreement or course of dealing between the parties," and it is not uncommon for the seller to protect himself by qualifying the quantity by the addition of terms such as "more or less" or "about" (*i*).

In 1859 two cases of *Tamvaco* v. *Lucas* were decided, the facts of which were converse. In the first case (*k*), the sale was of a wheat cargo "of about 2,000 quarters,

(*i*) *E.g.*, *Reuter* v. *Sala* (1879), 4 C. P. D. 239, "25 tons, more or less, Penang pepper"; *Payne* v. *Lillico* (1920), 36 T. L. R. 569, "4,000 tons of meal, 2 per cent. more or less"; *Harland & Wolff* v. *Burstall* (1901), 6 Com. Cas. 113, "about 500 loads of timber"; and cases cited in the text below.

(*k*) (1859), 1 E. & E. 581.

say from 1,800—2,200 quarters. . . . Sellers guarantee delivery of invoice weights, . . . buyers to pay for any excess of weight . . . the measure for the sake of the invoice to be calculated at the rate of 100 chetworts, equal to 72 quarters, . . . payments cash in London in exchange for usual shipping documents." The sellers tendered shipping documents for a cargo of wheat of 2,215 quarters with an invoice stating that the cargo was only 2,200 quarters, and the buyers rejected them. The sellers relied upon evidence from the out-turn that the quantity actually shipped was not more than 2,200 quarters. The Court held that the buyer was not bound to accept the documents, that the clause providing for payment for excess weights applied only to an excess within the limits prescribed by the contract, that the buyer could not have accepted the agreed quantity and rejected the excess and if he accepted he would have had to pay for the excess, and that the seller had no right to make out an invoice otherwise than in accordance with the bill of lading. The buyer, said Lord Campbell, C.J., "could not have accepted, and provisionally paid for, the cargo, without being involved in great perplexity as to how he should afterwards dispose of it, nor without danger of litigation with the plaintiffs, as vendors, and with those who might have become purchasers under him."

In the second case (*l*), on a similar contract, the facts were the converse. The bill of lading quantity was in accordance with the contract, but the quantity on board was less than 1,800 quarters, and the buyer was held not bound to pay against documents which erroneously stated the wheat to be within the limits of quantity prescribed by the contract.

In *Lomas & Co.* v. *Barff, Ltd.* (*m*) there was a sale

(*l*) (1859), 1 E. & E. 592.

(*m*) (1901), 17 T. L. R. 437; reversed on another point, *ibid.* 461 (C. A.).

of "about 4,000 cases" of currants c.i.f. London, upon the rules of the London Dried Fruit Association. By one of these rules "about" meant not more than 5 per cent. more or less. The sellers tendered documents in respect of 4,202 cases, or two in excess of the maximum quantity. The buyers refused to accept. Kennedy, J., held, under the Sale of Goods Act, 1893, s. 30 (2) (*n*), that the tender was not a good tender; the buyers had neither the legal right nor duty of selecting which two cases they would reject.

In *Harland & Wolff* v. *Burstall* (*o*), sellers of 500 loads of timber for shipment at Quebec c.i.f. Belfast, shipped 470 loads. The ship and cargo were lost on the voyage. The documents were not tendered to the buyers, but it was intended that the shipment should be applied to the contract. The buyers claimed damages for breach of the contract, and the question was whether the sellers had performed their obligations. Bigham, J., held that they had not. He added that: "Of course in carrying out a commercial contract such as this some slight elasticity is unavoidable; no one supposes that the delivery is to be within a cubic foot of the named quantity, but it must be substantially of the quantity named" (*p*).

In *Shipton, Anderson & Co.* v. *Weil Bros. & Co.* (*q*) the contract was for the sale of a cargo of wheat "weight as per bill or bills of lading . . . say 4,500 tons, 2 per cent. more or less; seller has the option of shipping a further 8 per cent. more or less on contract quantity." The sellers tendered a cargo of wheat which weighed 55 lbs. more than 4,950 tons, the limit of the quantity allowed by the contract. The buyers rejected the tender on the ground of excess, the value of which at the con-

(*n*) Set out *ante*, p. 63.
(*o*) (1901), 6 Com. Cas. 113.
(*p*) *Ibid.* at p. 116.
(*q*) (1912) 1 K. B. 574.

tract price was 4*s*. The contract price of 4,950 tons exceeded 40,000*l*. The sellers made no claim for the 4*s*. Having sold the cargo after rejection at a loss, they claimed damages for non-acceptance. On a special case stated by arbitrators, Lush, J., held that the quantity in excess was trifling, and as the price of the excess was not claimed the sellers had substantially performed the contract and the buyers were not entitled to reject under sect. 30 (2) of the Sale of Goods Act, 1893 (*r*). "The question is whether there has been a substantial departure from the contract. . . . The right to reject is founded upon the hypothesis that the seller was not ready and willing to perform his part of the contract. The tender of a wrong quantity evidences an unreadiness and unwillingness, but that, in my opinion, must mean an excess or deficiency in quantity which is capable of influencing the mind of the buyer. In my opinion, this excess is not. I agree that directly the excess becomes a matter of possible discussion between reasonable parties, the seller is bound to justify what he has done under the contract; but the doctrine of *de minimis* cannot, I think, be excluded merely because the statute refers to the tender of a smaller or larger quantity than the contract quantity as entitling a buyer to reject" (*s*). He said that if the sellers had expressly or impliedly insisted upon payment of the 4*s*. the case would have been different.

"Cargo." Where the sale is of a "cargo" (*t*), the precise effect to be given to that word may be a question of some difficulty. Although the answer depends upon the construction of the contract and the particular circumstances of the case, and therefore no rule of general application can

(*r*) Set out *ante*, p. 63.

(*s*) *Ubi supra*, at p. 576.

(*t*) "'Cargo' is a word with different meanings. It may mean one thing in a charter-party, another in a policy, another in a contract of sale." *Per* Lord Bramwell, *Colonial Insce. Co. of New Zealand* v. *Adelaide Marine Insce. Co.* (1886), 12 A. C. 128, at p. 129.

be formulated, the following cases may be usefully referred to.

In *Kreuger* v. *Blanck* (*u*), the defendant ordered of the plaintiffs in Sweden "a small cargo (of lathwood) of about the following lengths . . . . in all about sixty cubic fathoms" c.i.f. Bristol Channel. The plaintiffs were not able to procure a vessel of the exact size and chartered a vessel loaded with eighty-three fathoms. On arrival, the plaintiff's agent measured and set apart the amount of the defendant's order, and tendered to him a bill of lading for that quantity and a draft for acceptance; but the defendant declined to accept on the ground that the "cargo" was in excess of the order. It was held by Kelly, C.B., and Cleasby, B., Martin, B., dissenting, that "cargo" meant a whole cargo and not part of a cargo, and was so treated in the correspondence, and that the plaintiff had not complied with the order.

In *Borrowman* v. *Drayton* (*x*) the sale was of "a cargo of from 2,500 to 3,000 barrels (seller's option)" of petroleum, to be shipped from New York. The sellers chartered a ship and loaded 3,000 barrels and took a bill of lading for this quantity; but as this quantity did not constitute a full cargo a further quantity of 300 barrels was shipped, marked with a different mark, under

(*u*) (1870), L. R. 5 Ex. 179. *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395, shows that when the seller is a commission agent for the buyer, the use of the word "cargo" may not be given so stringent an effect. It is also to be observed that Blackburn, J., in that case said that, "if necessary, I should advise your Lordships to reconsider the decision of the Court of Exchequer in *Kreuger* v. *Blanck*," on the ground that the buyer does not suffer if the ship is larger than is required, and the superfluous space is utilised in a way consistent with his contract (at p. 410).

(*x*) (1876), 2 Ex. D. 15 (C. A.); followed in *In re Harrison and Micks, Lambert & Co.*, (1917) 1 K. B. 755, Bailhache and Atkin, JJ. ("the remainder" of the cargo "(more or less about) 5,400 quarters Manitoba wheat"); distinguished in *Paul* v. *Pim* (1921), 27 Com. Cas. 98, Bailhache, J., *infra*.

a separate bill of lading. Notice of shipment of 3,000 barrels was given to the buyer and the sellers were ready to deliver either the 3,000 barrels or 2,750, the mean between 2,500 and 3,000; but the buyer refused to accept any. It was held by the Court of Appeal (Cockburn, C.J., James and Mellish, L.J.J., and Baggallay, J.A.) that on the true construction of the contract "cargo" meant the entire quantity of goods loaded on the vessel, and the buyer was therefore not bound to accept part of a cargo. "Generally speaking," said Mellish, L.J., delivering the judgment of the Court, "the term 'cargo,' unless there is something in the context to give it a different signification, means the entire load of the ship which carries it, and it may fairly be assumed that when one man undertakes to sell and another to buy a cargo, the subject-matter of the contract is to be the entire load of the ship. And that such must have been the sense in which the term 'cargo' is used in this contract is materially strengthened by the agreement that the vessel shall proceed to a port of discharge to be determined, within certain limits, by the buyer, showing plainly that what was contemplated was that the vessel and its entire cargo were to be at his disposal. There are various reasons why a purchaser may wish to buy the whole quantity of goods loaded on board a particular vessel. Such a contract gives him a complete control of the vessel. It enables him to select the port of discharge, to appoint the place in the port at which the discharge is to take place, to be free from the inconvenience of other persons' goods being unloaded at the same time with his own, and from the competition arising from other persons' goods being ready for sale, at the same place, and at the same time, with his" (*y*).

In *Paul* v. *Pim* (*z*) the contract was for the sale c.i.f.

(*y*) 2 Ex. D. 15, at p. 19.
(*z*) (1922) 2 K. B. 360.

of "the cargo of Galatz and/or Foxanian maize shipped in good condition . . . per s.s. 'Rijn,' consisting of about 2,813 French tons, or what steamer carries as per bill or bills of lading dated about March 8th, 1921." After arrival of the steamer the buyers discovered that in addition to the maize there were on board fifty-eight tons of tobacco which had been put there without the seller's knowledge and were not mentioned in any bill of lading. The buyers claimed to reject the maize on the ground that they were entitled to a full and complete cargo of maize. Arbitrators found that the contract was for the sale of the cargo of maize actually shipped at the time of the contract, as comprised in the bill of lading, that the maize was in accordance with the contract, and that the buyers were not entitled to reject. Bailhache, J., held that the arbitrators were right. In coming to that conclusion he mentioned three points of difference between that case and the case of *Borrowman* v. *Drayton* (*supra*): firstly, in the latter case the cargo was a cargo to be loaded and not a cargo actually loaded in respect of which a bill of lading had been signed; secondly, the tobacco was of a different nature from the maize on board, and there was no possibility of confusion; thirdly, the tobacco was put on board not under any contract with the sellers but in fraud of the charter-party and of the sellers.

Although, in the contract, there is added to the word "cargo" a statement of a particular quantity of goods, unless the circumstances show that the intention was otherwise (*a*), the word "cargo" is *primâ facie* the ruling

(*a*) As, *e.g.*, in *Bourne* v. *Seymour* (1855), 16 C. B. 337, where the contract was for "about" 500 tons of nitrate, stated that "it is understood that the above nitrate is to form the full and complete cargo of the 'J. P.,'" and provided in certain events for the substitution of "another cargo or cargoes of equal quantity." The "J. P." arrived with all she could carry, which was considerably less than 500 tons. Held, that there was an absolute contract for 500 tons.

word, the statement as to quantity being regarded as a mere estimate (*b*).

Bill of lading must be confined to goods sold.

The bill of lading must comprise only the goods which are the subject of the sale. The buyer requires the bill of lading in order to receive the goods and also to be in a position to prosecute any claim against the shipowner arising out of the carriage, or to transfer these rights to a sub-purchaser. It is obvious that difficulties would or might arise if the seller included in the bill of lading other goods than those destined to the particular c.i.f. buyer, and, to adopt the language of A. T. Lawrence, J. (*c*), the buyer under such a contract is not "buying a litigation" or compelled to take delivery of documents which may force a litigation upon him. Thus, in *Hickox* v. *Adams* (*d*), sellers at New York of 1,000 quarters of wheat c.i.f. Bristol, through a mistake, shipped two parcels of 1,000 quarters to a third party, Kruger & Co., at Bristol, and forwarded to them a single bill of lading and policy of insurance for the whole quantity shipped. Later they informed the buyers of the mistake and that Kruger & Co. would deliver to them 1,000 quarters and present a draft for the price of these 1,000 quarters. The buyers refused acceptance of the draft and refused to accept the goods. The sellers sued for the price, and their action failed on the ground that they were not ready and willing to deliver the 1,000 quarters within the terms of their contract. The decision rested mainly upon the

(*b*) *Levi* v. *Berk* (1886), 2 T. L. R. 898 (C. A.), Lord Esher, M.R., Bowen and Fry, L.JJ. (sale of cargo said to be about 450 tons, which turned out to be only 341 tons); followed *In re Harrison and Micks, Lambert & Co.*, (1917) 1 K. B. 755, by Bailhache and Atkin, JJ. ("the remainder" of the cargo "(more or less about) 5,400 quarters"). And cf. *Tebbits* v. *Smith* (1917), 33 T. L. R. 508 (C. A.) ("quantity salved, estimated 8/10 tons").

(*c*) 16 Com. Cas. 95, at p. 101. And see *per* Lord Sumner in *Hansson* v. *Hamel & Horley, Ltd.*, (1922) 2 A. C. 36, at p. 46, quoted *ante*, p. 37.

(*d*) (1876), 34 L. T. 405 (C. A.).

inability of the sellers to present a separate policy of insurance covering only 1,000 quarters, but inability to present a separate bill of lading for the 1,000 quarters was equally fatal to their claim.

In the case of *In re Keighley, Maxted & Co. and Bryan, Durant & Co.* (*e*) the contract was for the sale of "about 3,000 tons of wheat (10 per cent. more or less) to be shipped by steamer" from India, payment to be made by cash in London within seven days from delivery of invoice in exchange for bill or bills of lading. The sellers had the option of shipping less or more than the minimum and maximum quantity respectively. In the former case the price of the quantity shipped short of the medium quantity was to be settled at the value at the date of appropriation; in the latter, the excess over the medium quantity was to remain for the seller's account. The sellers shipped in fact 3,800 tons, and appropriated 3,000 tons of that shipment to the contract, sending the buyers an invoice for 3,000 tons. The bills of lading of the 3,800 tons were two for 1,750 tons each, and two for 150 tons each, and the sellers offered to deliver either all the bills of lading or two for 1,750 tons each, leaving 800 tons or 500 tons, as the case might be, balance of the cargo in the buyer's possession, but the property of the sellers. The buyers refused to accept the tender. It was held by the Court of Appeal (Lord Halsbury, Lopes and Davey, L.JJ.) that as the contract, by the seller's appropriation, had become one for 3,000 tons the buyers were entitled to delivery of a bill or bills of lading for that quantity, and, as the bills of lading did not correspond with that quantity, they were entitled to refuse the tender.

Other documents required.

Where by the terms of the contract of sale or by custom of the trade other documents are deliverable to the buyer, they must be obtained and tendered to the buyer;

(*e*) (1894), 70 L. T. 155.

otherwise, the tender will not be a good one. Thus, for example, in the case of *In re Reinhold & Co. and Hansloh* (*f*) the sale was of 1,000 tons of yellow La Plata maize in good condition: "with legalised Chamber of Commerce certificate as to shipment, sound, dry and fit for export," c.i.f. Hamburg. The seller tendered two bills of lading to make up the 1,000 tons. Each described the maize as "marked and numbered as in the margin," that is, with an "F" on them. A certificate in the required form was obtained but did not state that the bags examined were those marked with an "F." The buyer refused to accept the documents on this ground, and the Court (Pollock, B., and Bruce, J.), on a special case stated, held that he was entitled to reject.

Other variations between shipping documents and contract entitling buyer to reject.

In general, any material variation between the shipping documents and the contract will entitle the buyer to reject (*g*). Thus, in *Ashmore* v. *Cox* (*h*), a stipulation in the contract for shipment "by sailer or sailers" was held to be a condition precedent.

In the case of *In re Goodbody & Co. and Balfour, Williamson & Co.* (*i*) the contract was for the sale of a cargo of wheat, shipped per "Vanduara," c.i.f. to any safe port in the United Kingdom. The "Vanduara" was at the time chartered for a voyage from Portland, Oregon, "to discharge at a safe port in the United Kingdom, Manchester excepted." The wheat was shipped under bills of lading for carriage to a safe port in the United Kingdom, Manchester excepted. The buyers refused to accept the shipping documents on the ground that the words "Manchester excepted" constituted a material variation of the contract. Arbitrators found

(*f*) (1896), 12 T. L. R. 422.

(*g*) As to whether a stipulation is a condition or is merely a warranty, breach of which sounds in damages, see *post*, p. 158.

(*h*) (1899) 1 Q. B. 436, cited in the text, *ante*, p. 58, where the relevant extract from the judgment is quoted.

(*i*) (1899), 4 Com. Cas. 119; 5 Com. Cas. 59 (C. A.).

that the words "port of Manchester," introduced into shipping documents, in a commercial sense only included Manchester and the waters adjacent thereto, and that in that sense Manchester was not a safe port for the "Vanduara." It was held, on these findings, that it was immaterial whether the words "Manchester excepted" were or were not in the shipping documents, and therefore the buyers were not entitled to refuse the shipping documents.

In *Thalman Frères & Co.* v. *Texas Star Flour Mills* (*k*) a contract for the sale of wheat c.i.f. Havre for shipment from Galveston contained the clause: "Clearance not later than May 31." The object of the stipulation was to ensure arrival of the wheat at Havre by the end of June so that the buyers could take advantage of a temporary suspension of the French import duty expiring on the 30th June. On the 28th May a certificate of clearance was issued by the Customs at Galveston authorising the ship to proceed to sea, though at that time part of the cargo only had been loaded, the remainder being alongside ready for loading. The loading was completed and the ship sailed on the 2nd June. She arrived at Havre on the 1st July, a day too late to enable the buyers to take advantage of the remission of the duty. Meanwhile, the buyers had paid drafts for the price of the wheat and had obtained the shipping documents. They then brought the action to recover damages for breach of contract and for return of the money paid. Bigham, J., whose decision was affirmed by the Court of Appeal, held that the clearance certificate had been given in accordance with the usual and recognised practice in America and, though the ship was not fully loaded and did not sail till the 2nd June, the provision in the contract as to clearance had been complied with, and the action failed. It was indicated that

(*k*) (1899), 4 Com. Cas. 265; 5 Com. Cas. 321 (C. A.).

the decision would have been different if the stipulation had been that the ship should *sail* by the 31st May.

On the other hand, in *Kidston* v. *Monceau Ironworks Co.* (*l*), where the sale was of 1,000 tons of iron to be delivered cost and freight Japan, "direct port specification to be given in the beginning of May, time of shipping May and June from Antwerp," and the buyers gave the specification in parts between May 12th and 15th, and the sellers thereupon repudiated the contract, Kennedy, J., held that delivery of the specification at the beginning of May was not in the circumstances a condition precedent, as the parties knew that it had to come from Japan, and therefore the date of its arrival was subject to contingencies; further, the time allowed for delivery was elastic, since it was spread over two months and the sellers could manufacture within eight days, and therefore were not prevented from producing the iron in due time.

Goods must be shipped to contractual destination.

Finally, the shipment must be on a vessel bound for the contractual destination. The seller is under an absolute duty to procure the shipment of the goods under such a bill of lading as will, subject to the exceptions therein contained, ensure their delivery at the port of destination specified in the contract of sale (*m*). Thus, in *Lecky & Co.* v. *Ogilvy, Gillanders & Co.* (*n*), the contract of sale provided that shipment was to be from Calcutta to Tripoli. There are two ports called Tripoli, one in Africa and the other in Syria. The contract was intended to refer to the former. The sellers arranged for shipment to Tripoli in Africa, but the goods were in fact shipped under a bill of lading for Tripoli in Syria, and the goods were delivered at that port. It was held by Mathew, J., and the Court of Appeal, that the buyers had a right of action for non-delivery of the goods.

(*l*) (1902), 7 Com. Cas. 82.
(*m*) See the judgments referred to *ante*, p. 29, n. (*b*).
(*n*) (1897), 3 Com. Cas. 29 (C. A.).

In *Acme Wood Flooring Co.* v. *Sutherland Innes Co.* (*o*), the contractual destination was a particular wharf. The goods were sold c.i.f. to buyers' wharf, Victoria Docks, London. The bill of lading did not provide for delivery at buyers' wharf. The goods were discharged in London elsewhere, and under the "London Clause" in the bill of lading certain charges became payable which would not have been payable if delivery had been made at the buyers' wharf. The question was on whom these charges fell. It was held by Bruce, J., that they must fall on the sellers, since, if the shipping documents had provided for delivery at the contractual destination, the "London Charges" would not have been payable.

In *Sargant & Sons* v. *East Asiatic Co., Ltd.* (*p*), the sale was of 100 tons of block gambier c.i.f. London. The sellers declared 100 tons per S.S. "Selandia," which arrived in London and discharged some cargo there. As the sellers, who were also the shipowners, had not received the bills of lading they gave delivery orders to the buyers against payment for the goods. The delivery orders were duly presented, lighters were sent for the goods, but delivery was refused by the ship's agents, and the "Selandia" sailed for Copenhagen carrying the goods in her. The block gambier was delivered at a later date to the buyers in London. It appeared when the bills of lading came to hand that the goods had been shipped under bills of lading making the goods deliverable at Copenhagen. The buyers recovered damages for loss resulting from the delay.

(*o*) (1904), 9 Com. Cas. 170.

(*p*) (1915), 85 L. J. K. B. 277. In the same case there was a second contract for the sale of pepper c.i.f. London, where the bill of lading was forthcoming. The bill of lading provided for delivery at Copenhagen, but was indorsed by the defendants, as shipowners, "to be delivered in London." No exception was taken to it so indorsed, and it was treated as if it had originally been made out for London.

CHAPTER III.

OF INSURANCE.

Seller's obligations.

SUBJECT to any special provisions in the contract of sale, the duty of a seller under a c.i.f. contract, with regard to insurance, is to effect at his own cost with reputable insurers a valid policy of marine insurance which shall be available for the benefit of the buyer, covering the transit contemplated by the contract, on the terms current in the trade, in an amount representing the reasonable value of the goods (*a*).

The terms.

Whether a policy of insurance is "upon the terms current in the trade" (*b*), or is "the ordinary contract of insurance of the goods on that voyage" (*c*), is a question of fact to be determined according to whether it is or it is not the usage and practice in the trade to accept such a policy under such a contract of sale as that under which it is tendered (*d*). The test will involve such considerations as the character of the goods, the nature of the vessel and the route of the transit. In *Borthwick* v. *Bank of*

(*a*) See judgments cited in Ch. I. from *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 214, at p. 220; *ibid.* at p. 956; (1912) A. C. 18; *C. Groom, Ltd.* v. *Barber*, (1915) 1 K. B. 316, at p. 324; *Johnson* v. *Taylor Bros. & Co., Ltd.*, (1920) A. C. 144, at pp. 149, 156. As to the duty of a consignor agent instructed to insure, see Arnould, Marine Insurance, 10th ed. sects. 150, 156.

(*b*) *Per* Hamilton, J., *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. at p. 220.

(*c*) *Per* Scrutton, J., *Arnhold Karberg & Co.* v. *Blythe*, (1915) 2 K. B. 379, at p. 388.

(*d*) *Tamvaco* v. *Lucas* (1862), 3 B. & S. 89. Cf. *per* Kennedy, J., *Burstall* v. *Grimsdale* (1906), 11 Com. Cas. 280, at p. 290.

New Zealand (*e*), a question arose as to what was the usual form of insurance in the frozen meat trade in the following circumstances. A bank which had undertaken to negotiate drafts drawn by shippers on the plaintiff in respect of consignments of frozen meat, the drafts to be accompanied by the usual shipping documents, negotiated a draft attached to which was a policy containing a clause "To pay a total loss by total loss of vessel only." The plaintiff in the ordinary course accepted the draft before examining the shipping documents. A partial loss of the consignment occurred which the plaintiff could not recover by reason of the clause in the policy referred to. Mathew, J., held on the evidence that the usual form of policy in the trade was a policy covering all risks, and that the bank having, in breach of its contract with the plaintiff, negotiated a draft which was not accompanied by a policy in the proper form, was liable to make good the plaintiff's loss.

The customary insurance will be found generally, if not always, to exclude war risk; in other words, the policy of insurance is not improper because it contains the "f.c. and s." clause (*f*). Such a question arose in respect of the jute trade in the case of *C. Groom, Ltd.* v. *Barber* (*g*), where Atkin, J., endorsed a finding of the Appeal Committee of the United Kingdom Jute Goods Association that the tender of a policy containing the "f.c. and s." clause satisfied the seller's obligations in that trade. In that case it was also decided that the incorporation in the contract of a clause: "War risk for buyers' account," did not involve the seller in an obligation to effect, though at the buyers' expense, a war risk insur-

(*e*) (1900), 6 Com. Cas. 1.

(*f*) "Warranted free of capture, seizure and detention, and the consequences thereof" or similar words.

(*g*) (1915) 1 K. B. 316. And see *Weis & Co.* v. *Credit Colonial et Commercial, Antwerp,* (1916) 1 K. B. 346, cited in the text, *post,* p. 84.

ance; that the words only meant that the war risk was the buyers' concern, and if they wanted to cover war risk they must do so themselves. In certain trades the customary insurance is f.p.a. (free of particular average).

Special provisions in the contract as to insurance.

There may be special stipulations in the contract of sale with regard to the perils to be insured against, or the *quantum* of damage to be covered, and in such case the seller must exactly comply with them. Examples of such stipulations are to be found in the following cases:—

In *Yuill & Co., Ltd.* v. *Scott-Robson* (*h*), the sale was of cattle at Buenos Ayres c.i.f. to Durban to be insured against "all risks." The seller delivered to the buyers an ordinary Lloyd's policy, to which were attached certain clauses, headed "All Risks, Live Stock," which included the following: "To cover mortality, jettison, washing overboard, and risks of every kind from time of arrival at wharf and until delivered to consignees, but free of all claim for particular average and depreciation in respect of animals which walk ashore. . . ." The policy also contained the clause, "warranted free of capture, seizure and detention, and the consequences thereof." On the voyage foot and mouth disease broke out among the cattle, and in consequence the steamer was not allowed by the authorities at Durban to land cattle, and on that account a number of beasts had to be slaughtered on board. The question in the action was whether the policy complied with requirement of an "all risks" policy in the contract. It was held by Channell, J., whose decision was affirmed by the Court of Appeal (Lord Alverstone, L.C.J., Buckley and Kennedy, L.JJ.), that although as between an insurance broker and underwriters the insertion of an "f.c. and s." clause in an "all risks" policy was usual, the policy containing such a clause did not comply with the terms of the contract of sale which entitled the buyers to a policy protecting them against the risk of the cattle

(*h*) (1907) 1 K. B. 685; (1908) 1 K. B. 270 (C. A.).

not being allowed to be landed by reason of government regulations.

In *Vincentelli & Co.* v. *John Rowlett & Co.* (*i*), where a contract for the sale of citrons c.i.f. Antwerp contained the term, "Insurance to be effected by us (sellers) all risks," and the citrons were damaged by reason of improper stowage on deck, against which the policy effected by the sellers afforded no protection, Hamilton, J., held, upon the construction of the contract, in view of the evidence, that the word "risk" was used to describe the *quantum* of loss in respect of the accident producing the loss, and that the sellers satisfied their obligation by procuring an insurance to cover all risks in the sense of the entire *quantum* of loss, although it did not protect the buyer against all causes of accident.

In the last mentioned case a point was raised in argument on behalf of the sellers that, under such a contract as appeared in that case, all that the seller need procure is contractual protection against all risks, partly under the contract of carriage, and partly under the contract of insurance, and that it is sufficient if, under the one or the other, there is a cause of action for all kinds of damage. It was not necessary to decide the point, and Hamilton, J., refrained from expressing any opinion on the question, which he regarded as "novel and difficult." It is submitted, however, that if the contract calls for insurance against "all risks," the buyer is entitled to the protection stipulated in a policy.

The amount for which the goods must be covered is the reasonable value of the goods (*k*). What is the reasonable value is a question of fact (*l*). The value is the value at the place of shipment, and not the value at the des- The amount.

(*i*) (1911), 16 Com. Cas. 310. Cf. *Schloss* v. *Stevens*, (1906) 2 K. B. 665 ("all risks by land and water"= all risks whatsoever).

(*k*) *Tamvaco* v. *Lucas* (1861), 31 L. J. Q. B. 296; *Johnson* v. *Taylor Bros. & Co., Ltd.*, (1920) A. C. 144, at p. 149.

(*l*) *Tamvaco* v. *Lucas*, *ubi supra*.

tination of the goods, a matter on which the seller is necessarily often ignorant. It does not cover anticipated profit. Freight payable forms no part of it. If the goods arrive the buyer gets the value of the freight in the increased value of the goods; if they are lost in the transit no freight is payable. In the absence of special stipulation, the cost price of the goods would be a proper measure of value (*m*); and it is questionable whether there can be any obligation on the seller to cover a rise in value of the goods between the date of the contract and the time of shipment (*n*). If the buyer desires to cover increased value or his anticipated profit, he must either stipulate in the contract for such increased insurance, or effect additional insurance on his own account. So contracts of sale c.i.f. frequently provide for insurance in excess of the invoice price, *e.g.*, "gross invoice amount plus 10 per cent.," "insurance 5 per cent. over net invoice amount to be effected by sellers for account of buyers."

In *Tamvaco* v. *Lucas* (*o*) there was a contract for the sale of a cargo of wheat afloat c.i.f. any safe port in the United Kingdom. The seller tendered to the buyer with other shipping documents a provisional invoice which estimated the cargo of wheat, calculated at 50*s.* a quarter, at 4,626*l.*, including the freight at 1,001*l.* 10*s.* 0*d.* The policy of insurance tendered valued the cargo at 3,600*l.* The buyers claimed to be entitled to reject the tender because the policy was of an insufficient amount. It was held by the Exchequer Chamber, affirming the judgment of the Court of Queen's Bench, that it was not a question of law, but a question of fact whether, under all the circumstances, the policy was a sufficient document within the meaning of the contract; that the freight

(*m*) See, *e.g.*, *Harland & Wolff* v. *Burstall* (1901), 6 Com. Cas. 113, at p. 117.

(*n*) The point was raised, but not decided, in *Manbre Saccharine Co., Ltd.* v. *Corn Products Co., Ltd.*, (1919) 1 K. B. 198.

(*o*) (1861). 30 L. J. Q. B. 234; 31 L. J. Q. B. 296.

formed no part of the value to be insured; and that a deficiency of 24*l*. 10*s*. 0*d*. in the value insured after deduction of the freight from 4,626*l*. was not so great as to justify the buyer in refusing the documents on the ground of inadequate insurance. "It is said on the part of the plaintiffs," said Cockburn, C.J., in his judgment, "that at all events the insurance was not to cover the freight, but only the value of the cargo, as compounded of the cost of the cargo at the place of shipment, the shipping of it, and the commissions and other charges which would be incidental to the shipping of the cargo, and also the premiums of insurance, and if the 1,001*l*. 10*s*. 0*d*. were therefore deducted, as that amount ought to be, from the sum total, that there would only remain uncovered by the policy a comparatively insignificant sum of 24*l*. 10*s*. 0*d*. The first question is, whether that is a correct view of the matter, and whether the freight ought to be deducted, as not meant to be included in the policy of insurance and covered by it. I think that is the correct view, and when we are dealing with a policy of insurance as one of the shipping documents that are to be delivered by the seller to the buyer in order to protect the buyer, the freight is not a matter that ought to be included in the terms of such an agreement, so as to be covered by the policy of insurance.

"Then comes the question, whether the deficiency of 24*l*. 10*s*. 0*d*. is a matter that could fairly be objected to on the delivery of such a shipping document as this. On that part of the case, as it is presented to us, I think that our decision ought to be in favour of the plaintiffs. The contract provides for the payment by the buyers on the delivery of the shipping documents. By that I understand the ordinary and usual shipping documents, as they are understood in contracts of this nature by members of the mercantile community. The policy of insurance is undoubtedly one of these; and if the policy, instead of being such as an ordinary and usual shipping

document, turns out substantially a defective one, and such as would not afford the buyer a reasonable protection and indemnity against risk, which he is entitled to under the terms of such a contract, and the shipping documents were accordingly rejected, and the performance of the contract resisted on that ground, I am far from saying that it would not be a sufficient ground to justify a buyer in refusing to fulfil the terms of the contract of purchase and sale. But it becomes a very different question whether the present small and comparatively insignificant deficiency may be made a mere pretext for a departure from the contract, when substantial and *bonâ fide* protection is afforded to the buyers by means of the policy" (*p*).

Crompton, J., said: "The terms of the contract relate to the policy on the shipment—that the insurance must cover the value of the goods, and the cost of the insurance, as at the port of loading, but does not include the freight or profit at the port of discharge. The buyer buys what the seller sells, and puts himself, in effect, in his shoes. If the first man buys from the original shipper, I think he puts himself in his shoes as it were, and takes the policy from him—supposing the policy is a right policy with regard to the first shipper—and it is not determined by the supposed value of the goods that the buyer thinks them worth when they come to England. That being so, the only question would be one of fact—is this a document fairly to be taken as a shipping document, accompanying the rest of the papers, and a fair *bonâ fide* policy?" (*q*).

"I quite agree," said Blackburn, J., "with what has fallen from the other members of the Court, that the policy of insurance was not to include the freight, which was never at the risk of the defendants; for if the ship had gone down they could not have been called upon to

(*p*) 30 L. J. Q. B. 234, at p. 239. (*q*) *Ibid.* at p. 241.

pay this freight, and, therefore, to say that they were entitled to a policy, which, in the event of the ship going down, would enable them to recover the value of the freight, which they had not paid for, would be, in my opinion, an argument *ad absurdum*" (*r*).

Notice of shipment.

Since the buyer under a c.i.f. contract may require to take out at his own cost additional insurance, either to cover risks not covered by an insurance "on terms current in the trade," or to cover increased value, it would seem not unreasonable that he should be entitled to receive from the seller timely notice of shipment. It seems to be settled, however, that he is not entitled to receive any such notice, unless he has expressly stipulated for it in the contract. The Sale of Goods Act, 1893, s. 32 (3), does not apply to c.i.f. contracts. That sub-section is as follows:—

"Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit."

In the case of *Wimble* v. *Rosenberg* (*s*), where it was held by the Court of Appeal (Vaughan Williams and Buckley, L.JJ., Hamilton, L.J., dissenting), reversing on this point Bailhache, J., that the sub-section applies to f.o.b. contracts, it seems to have been conceded that it does not apply to c.i.f. contracts, and in the later case of *Law & Bonar, Ltd.* v. *British American Tobacco Co., Ltd.* (*t*), Rowlatt, J., definitely so held. In that case

(*r*) *Ibid.* at p. 243.

(*s*) (1913) 1 K. B. 279; (1913) 3 K. B. 743 (C. A.); followed in *Northern Steel & Hardware Co., Ltd.* v. *John Batt & Co. (London), Ltd.* (1917), 33 T. L. R. 516 (C. A.).

(*t*) (1916) 2 K. B. 605.

the contract, which was made before the outbreak in 1914 of the European War, was for the sale of Calcutta hessian at a price c.i.f. Smyrna to be shipped from Calcutta in time to arrive at Smyrna by September, 1914. The goods were duly shipped on the British steamer "City of Winchester," the bill of lading being dated July 20th, 1914, and an insurance was effected "f.c. and s." On or about the 13th August, *i.e.*, some days after the declaration of war between Great Britain and Germany, the vessel was sunk by a German cruiser and the goods were lost. No notification of the shipment had been made to the buyers, and the goods were not covered against war risks. The buyers refused to take up the documents, resting their refusal, in part, upon the contention that it was the sellers' duty to notify them at the earliest possible moment of the name of the steamer by which the goods had been shipped and they had failed to do so. In his judgment, Rowlatt, J., said (*u*) with regard to the sub-section referred to: "It clearly does not apply to a c.i.f. contract in times when no one contemplated war, and when, therefore, war is not being usually insured against. It does not apply because the contract c.i.f. provides for all the insurance that is contemplated or usual and the seller is to effect it. That was the nature of this contract when made. . . . I say nothing as to whether the sub-section could apply to a contract c.i.f. made at a time when insurances other than those to be provided by the seller—*e.g.*, against war risks—are usual. That point does not arise."

In the case of *Weis & Co.* v. *Credit Colonial et Commercial Antwerp* (*x*), sellers of bean oil to be shipped from the East c.i.f. to Antwerp under a contract made in June, 1914, declared in July a portion of the goods shipped on the British steamer "Glenearn" in May. On the outbreak of war on August 4th the "Glenearn"

(*u*) (1916) 2 K. B. 605, at p. 608. (*x*) (1916) 1 K. B. 346.

was seized by the Germans while at sea and taken to Hamburg. The sellers tendered the documents, including a policy containing the f.c. and s. clause, on August 18th, and the buyers refused to take them up. Bailhache, J., held that it was sufficient for the sellers to procure a policy containing the f.c. and s. clause. The buyers, in fact, had notice of the shipment in July and, therefore, had the opportunity, if they had been so minded, to cover themselves against war risks.

In practice, little difficulty is experienced through the absence of any obligation to give notice of shipment to the buyer. A buyer who desires to obtain additional protection to cover his interest does so usually by means of a floating policy or open cover, followed by a declaration (*y*). But in many contracts at the present time express provision is inserted requiring a declaration of shipment, such as, for example, "the name of the vessel, marks and full particulars to be declared to the buyer with due despatch." A declaration then becomes a condition of the contract (*z*).

The insurance must cover only the goods sold.

Just as the bill of lading must be confined to goods which are the subject-matter of the sale, so the insurance must cover only the goods mentioned in the bills of lading and invoices; otherwise, the buyer would be only one of those interested in the insurance, and the rights on the policy might become so involved that neither the policy nor the goods insured by it could be safely dealt with (*a*). "These documents have to be handled by banks, they have to be taken up or rejected promptly and without any

(*y*) See Marine Insurance Act, 1906, s. 29: "(1) A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particulars to be defined by subsequent declaration. (2) The subsequent declaration or declarations may be made by indorsement on the policy, or in other customary manner."

(*z*) See *Reuter* v. *Sala* (1879), 4 C. P. D. 246 (C. A.), *ante*, p. 55.

(*a*) See *per* Turner, L.J., *Ralli* v. *Universal Marine Insce Co.* (1862), 6 L. T. 34, at p. 37; *per* McCardie, J., *Manbre Saccharine Co.* v. *Corn Products Co.*, (1919) 1 K. B. 198, at p. 205.

opportunity for prolonged enquiry, they have to be such as can be retendered to sub-purchasers, and it is essential that they should so conform to the accustomed shipping documents as to be reasonably and readily fit to pass current in commerce" (*b*).

In *Hickox* v. *Adams* (*c*), sellers at New York of 1,000 quarters of wheat c.i.f. Bristol, by mistake shipped a cargo of 2,000 quarters to a third party, Kruger & Co., at Bristol, and forwarded to them a bill of lading and a policy of insurance for the entire quantity shipped, and drew upon them for the price. When the mistake was discovered, and while the goods were still afloat, the sellers told the buyers of it, and that Kruger & Co. would deliver to them (the buyers) 1,000 quarters of wheat and present a draft for the price. The buyers refused to accept. It was held (Lord Cairns, L.C., Lord Coleridge, C.J., and Mellish, L.J.) that, assuming that Kruger & Co. had been willing to hand over the policy to the buyers, the latter would not have been in the same position as if they had had a separate policy, and their refusal was justified.

The insurance must cover the entire transit.

The insurance must cover the whole transit contemplated, otherwise the buyer will not receive the protection which he has contracted to get. The buyer "wants a policy covering the whole adventure" (*bb*). In *Belgian Grain and Produce Co., Ltd.* v. *Cox & Co., Ltd.* (*d*), the sale was of Japanese green peas to be shipped from Japan c.i.f. to Marseilles, direct or indirect, with or without transhipments, buyers to furnish an irrevocable bank credit in favour of the sellers. The defendant bank, on the buyers' instructions, opened a documentary confirmed credit in favour of the sellers against surrender of the documents

(*b*) *Per* Lord Sumner, *Hansson* v. *Hamel & Horley, Ltd.*, (1922) 2 A. C. 36, at p. 46.

(*bb*) *Per* Scrutton, J., *Landauer & Co.* v. *Craven & Speeding Bros.*, (1912) 2 K. B. 94, at p. 105; and see *ante*, pp. 31-39.

(*c*) (1876), 34 L. T. 404, cited *ante*, p. 70, in relation to the similar point as to a separate bill of lading.

(*d*) (1919) W. N. 308 (C. A.).

on the arrival of the steamer. In due course the sellers tendered the documents to the defendants, but they refused to pay on the ground that whereas the policy covered the peas on the S.S. "Kassado Maru" and S.S. "Koyei Maru," the peas arrived on the S.S. "Saigon Maru." The facts were that the peas were loaded on the "Koyei Maru," and were transhipped into the "Kassado Maru" and thereafter transhipped into "Saigon Maru," under rights reserved by the bill of lading. The policy of insurance, however, contained the clause "including all liberties as per contract of affreightment," and the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) held that the clause in the policy included the rights reserved by the bill of lading, and the policy was therefore sufficient.

A policy is required.

The insurance must be contained in a policy capable of being assigned to the buyer, unless it is otherwise provided by the contract of sale (*e*); and the policy must be tendered to the buyer with the other documents on presentation (*f*), even though before presentation the goods have arrived in safety. Thus, in *Orient Co., Ltd.* v. *Brekke and Howlid* (*g*), goods were shipped under a c.i.f. contract at Bordeaux for Hull, and a bill of lading and an invoice were sent to the buyers, but no insurance of the goods from Bordeaux to Hull was ever effected. The goods arrived safely at Hull, but the buyers refused to accept them. The sellers sued for the price, and the buyers set up the defence that, no insurance having been effected, the contract had not been fulfilled. Lush and Rowlatt, JJ., held that the sellers having failed to fulfil an essential condition of the contract by not effecting an insurance were not in a position to sue for non-acceptance.

(*e*) See, *e.g.*, *Burstall* v. *Grimsdale* (1906), 11 Com. Cas. 280, where, under the contract, a certificate of insurance was made sufficient.

(*f*) See *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395, at p. 406; *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 214, at p. 220; and *post*, Ch. IV., p. 120.

(*g*) (1913) 1 K. B. 531.

In *Denbigh, Cowan & Co.* v. *Atcherley & Co.* (*h*), by a contract expressed to be c.i.f., sellers sold to buyers tapioca to be shipped at Java for Liverpool "to be taken on c.i.f. terms . . . payment cash (before delivery, if required) against documents or *delivery order*." When the tapioca arrived the sellers tendered to the buyers a delivery order, but no insurance policy. The buyers refused to take delivery on the ground that there was no insurance policy. The sellers, on the other hand, contended that under the contract they had an option of treating the contract either as a c.i.f. contract or as an "arrival" contract, that is, of either endorsing the usual shipping documents, or, in the first instance, a delivery order only. It was held by the Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), on the construction of the contract, that the buyers were entitled to receive either all the documents under a c.i.f. contract or a delivery order "in lieu of one of those documents necessary for giving possession of the goods," *i.e.*, the bill of lading, and that consequently the buyers were justified in refusing to take delivery without a policy of insurance.

In *Manbre Saccharine Co.* v. *Corn Products Co., Ltd.* (*i*), the sellers, instead of tendering a policy of insurance, wrote to the buyers stating that they held them covered by insurance "for the amount of 4,322*l*. in accordance with the terms of policy of insurance in our possession *re* shipment ex S.S. 'Algonquin.'" The insurance covered a quantity of goods in addition to the goods which were the subject-matter of the sale. The sellers contended that by this letter they had discharged their obligations. They argued that a seller's duty under a c.i.f. contract had been modified by recent practice amongst business men; but an attempt to prove a general custom modifying the seller's obligation to tender a policy was abandoned, and they failed to show any usage or practice between the

(*h*) (1921), 90 L. J. K. B. 836 (C. A.). See *ante*, p. 6, n. (*l*).
(*i*) (1919) 1 K. B. 198.

parties themselves involving the buyers in an obligation to accept the letter in place of an actual policy of insurance. In the course of his judgment McCardie, J., said (*k*): "It was suggested on behalf of the plaintiffs that the letter amounted either to an equitable assignment of the insurance moneys to the extent of 4,322*l*., or to a declaration of trust to such amount in respect of these moneys. Even if this suggestion be well founded, yet there is a wide difference between an actual policy of insurance transferable to the defendants as contemplated by sect. 50, subsect. (3) of the Marine Insurance Act, 1906 (*l*), and such a letter of the defendants here. The plaintiffs, I hold, were clearly entitled to a policy and not to a mere assertion by the defendants that a policy existed, and that the defendants would hold the plaintiffs covered."

In *Wilson, Holgate & Co., Ltd.* v. *Belgian Grain and Produce Co., Ltd.* (*m*), where the sellers instructed their brokers to insure the goods sold for the amount of the contract price, and the brokers wrote to the buyers stating that they had effected the insurance for that amount and enclosed the brokers' cover note therefor, evidence was tendered on behalf of the sellers that a custom had arisen according to which the seller might tender a broker's note instead of a policy, but Bailhache, J., held that the proof of the alleged custom was insufficient. He said (*n*): "The only question I have to decide is whether or not there was an effective legal tender of the shipping documents by the plaintiffs which the defendants were bound to accept. It has been settled, at any rate since Blackburn, J., delivered his well-known judgment in *Ireland* v. *Livingston* (*o*) about forty-seven years ago, and it had apparently been

(*k*) *Ibid.* at p. 205.

(*l*) "A marine policy may be assigned by endorsement thereon or in other customary manner."

(*m*) (1920) 2 K. B. 1.

(*n*) *Ibid.* at p. 7.

(*o*) (1872), L. R. 5 H. L. 395, 406, *ante*, p. 11.

settled even earlier, that under a c.i.f. contract for the sale of goods the documents which the seller is bound to tender to the buyer are a bill of lading, an invoice and a policy of insurance, and it is well understood that under a contract of that kind these are the documents which the seller is required to tender." He then referred to the evidence of witnesses who had stated that it was the common practice now for sellers to tender, instead of a policy of insurance, a broker's cover note or a certificate of insurance, and continued: "A certificate of insurance is generally, but not always, used in a case where the goods which are the subject-matter of the sale are insured by an open or a floating policy, which covers other goods as well as the particular goods in question, and is for a larger amount than if it covered these goods only. One of the witnesses says that the certificate of insurance is also used to take the place of a broker's cover note. It must be borne in mind that, in dealing with certificates of insurance, I am not referring to American certificates of insurance, which stand on a different footing and are equivalent to policies, being accepted in this country as policies (*p*). I am now dealing only with brokers' cover notes and certificates of insurance as issued by brokers in this country. The plaintiffs' witnesses have stated that these brokers' cover notes and certificates of insurance are constantly accepted by buyers in place of policies of insurance, but they could give no instance in which there has been any contest as to the validity of a tender of a cover note or certificate, still less did they give any instance in which, on a buyer's demand for and insistence upon a policy being resisted, he has given way. On the contrary, these witnesses were all very careful to explain that they were not prepared to say that the buyer was bound to take

(*p*) But see, as to this, *Diamond Alkali Export Corporation* v. *Fl. Bourgeois*, (1921) 3 K. B. 443, *per* McCardie, J., cited *post*, p. 93, and *Donald Scott & Co.* v. *Barclays Bank, Ltd.* (1923), 28 Com. Cas. 253 (C. A.), cited *post*, p. 97.

a cover note or certificate of insurance instead of a policy of insurance. All that they could say was that so far as they knew these cover notes and certificates were constantly taken and never refused. The true position appears to me to be this: The seller must be prepared to deliver, and if required to do so, must deliver a policy of insurance, but in order to facilitate business, particularly during the war when there was a shortage of clerks and a superabundance of business, commercial men have resorted to this practice of not insisting upon their strict right to a policy, and have been taking these cover notes and certificates of insurance.

"I am not satisfied that since *Ireland* v. *Livingston* was decided any custom has arisen which obviates the necessity for a tender by the seller of a policy of insurance if the buyer requires it. There are, of course, obvious differences between the buyer's position under a policy of insurance and his position under a broker's cover note or a certificate of insurance. I will mention only one or two of these. On a policy of insurance which deals with the buyer's own contractual goods and with those of nobody else, the buyer has a direct right of action on the policy against the underwriters. On a broker's cover note he has apparently no right of action against anybody, even, I am inclined to think, where the cover note is endorsed. The broker, I should suppose, is liable to his own principal. Moreover, a right of action against a broker, even if it exists, is a very different right from that of an action against underwriters. The same observation applies to a certificate of insurance. So far as the broker's cover note is concerned, the buyer might also be faced with a further serious difficulty arising from the assertion by the broker of his general lien for his charges against the person who instructed him to take up the policies, and on whose behalf he issued his cover note or his certificate of insurance. These are some of the practical differences between a policy of in-

surance on the one hand and a cover note or a certificate of insurance on the other. In my judgment it has not been proved that under a c.i.f. contract the buyer is bound to take any other document than a policy of insurance. He has, as I understand it, a legal right to require a policy, and a policy which relates to the goods which are the subject-matter of his own contract of sale and to no other goods."

In *Diamond Alkali Export Corporation* v. *Fl. Bourgeois* (*q*), which has been already cited (*ante*, p. 50) in connection with bills of lading, the sellers of soda ash to be shipped from American seaboard c.i.f. Gothenburg tendered with other documents a certificate of insurance issued by an American insurance corporation, the substantive words of which were as follows: "This is to certify that on the 8th of November, 1920, this Company insured under policy No. 2,319 for D. A. Horan $5,790 on 280 bags 58 per cent. dense soda ash N. L. & Y. Test, valued at sum insured. Shipped on board of the S.S. 'Anglia' and/or other steamers at and from Philadelphia to Gothenburg. And it is hereby understood and agreed that, in case of loss, such loss is payable to the order of the assured on surrender of this certificate. This certificate represents and takes the place of the policy and conveys all the rights of the original policy holder . . . as fully as if the property was covered by a special policy direct to the holder of this certificate. . . ." The buyers contended that the tender of this certificate was not a good tender under a c.i.f. contract, and McCardie, J., upheld their contention. In the course of his judgment he said (*r*): "In all the cases a 'policy of insurance' is mentioned as an essential document. The law is settled and established. I may point out that in *Burstall* v. *Grimsdale* (*s*) it was expressly

(*q*) (1921) 3 K. B. 443.
(*r*) *Ibid.* at p. 454.
(*s*) (1906), 11 Com. Cas. 280.

provided by the contract that a certificate of insurance might be an alternative for an actual policy. I ventured in *Manbre Saccharine Co.* v. *Corn Products Co.* (*t*) to discuss the relevant authorities, including the lucid judgment of Atkin, J., in *C. Groom, Ltd.* v. *Barber* (*u*)—a judgment which I have again most carefully read. It seems plain that a mere written statement by the sellers that they hold the buyers covered by insurance in respect of a specified policy of insurance is not in itself a policy of insurance within a c.i.f. contract: see the *Manbre Saccharine Case* (*t*). It seems plain also that a broker's cover note or an ordinary certificate of insurance are not adequate agreements within such a contract: see Bailhache, J., in *Wilson, Holgate & Co.* v. *Belgian Grain and Produce Co.* (*x*).

"Does the present document fulfil the seller's contractual duty? In *Wilson, Holgate & Co.'s Case* (*x*) Bailhache, J., said: 'It must be borne in mind that, in dealing with certificates of insurance, I am not referring to American certificates of insurance which stand on a different footing and are equivalent to policies, being accepted in this country as policies.' It will be observed that Bailhache, J., used the word 'accepted,' he does not say that buyers are 'bound to accept' them. The sellers here rely on that passage and also on the notes to Scrutton on Charterparties, 10th ed. p. 185, note (*e*), where it is said: 'A certificate of insurance issued by an insurance company under a floating policy, upon which document the company can be sued, would suffice in any case' (*y*). The buyer strongly challenges that view and

(*t*) (1919) 1 K. B. 198, *ante*, p. 88.

(*u*) (1915) 1 K. B. 316, *post*, p. 117.

(*x*) (1920) 2 K. B. 1, 7.

(*y*) Now 11th ed., p. 191, n. (*e*). The learned editors say: "We suggest that if the document tendered, though called a certificate, contains *all* the terms of the insurance, and upon it *by itself* the company can be sued, it is immaterial that it is called a certificate

his counsel require me to express an independent opinion on the point. I do so with the greatest diffidence and reluctance in view of the weight carried by even the dicta of such experienced and distinguished judges as Scrutton, L.J., and Bailhache, J. I feel bound to express my view, not upon a question of business convenience, but upon the strict law of the matter. I assume that this document (which is not stamped) was given under a floating policy issued by the insurance company to D. A. Horan. Now the certificate is not a policy. This is conceded. It is a certificate that a policy was issued to D. A. Horan, and it incorporates the terms of that policy. These terms I do not know, nor is there anything before me to indicate that the buyers knew them. The certificate does not show whether that policy was in a recognised or usual form or not. The certificate does not therefore contain all the terms of the insurance. Those terms have to be sought for in two documents—namely, the original policy and the certificate. But even if this document is not a policy, yet the sellers say it is 'equivalent to a policy.' In connection with that phrase it is well to quote from another part of the judgment of Bailhache, J., in *Wilson, Holgate & Co.'s Case*. He there says: 'He'—the buyer—'cannot be compelled to take a document which is something like that which he has agreed to take. He is entitled to have a document of the very kind which he has agreed to take, or at least one which does not differ from it in any material respect.' This leads me to ask whether the document before me differs in any material respect from a policy of insurance. To begin with, I do not see how the buyer here could know whether the document he got was of a proper character (one he was bound to accept) unless he saw the original policy, and examined its conditions,

and not a policy, or that it purports to be issued pursuant to some policy previously in existence."

whether usual or otherwise. In the next place I feel that a certificate of insurance falls within a legal classification, if any, different to that of a policy of insurance. The latter is a well-known document with clearly defined features. It comes within definite, established and statutory legal rights. A certificate, however, is an ambiguous thing; it is unclassified and undefined by law; it is not even mentioned by Arnould on Marine Insurance. No rules have been laid upon it. Would the buyer sue upon the certificate or upon the original policy plus the certificate? If he sued simply on the certificate he could put in a part only of the contract, for the other terms of the contract—namely, the conditions of the actual policy—would be contained in a document not in his control and to the possession of which he is not entitled. Thirdly, I point out that before the buyer could sue at all he would have to show that he was the assignee of the certificate: see Arnould, 9th ed. ss. 175—177. In what way can he become the assignee? It is vital to remember the provisions of the Marine Insurance Act, 1906. Now the relevant statutory provision is sect. 50, sub-sect. (3), which says: 'A marine policy may be assigned by endorsement thereon or in other customary manner.' This sub-section, however, only applies, as far as I can see, to that which is an actual marine policy. Sect. 90, the interpretation clause, says: 'In this Act unless the context or subject-matter otherwise requires,—"policy" means a marine policy.' The Act contains no reference, express or implied, to a certificate of insurance. Sect. 22 says: 'Subject to the provisions of any statute, a contract of marine insurance is inadmissible in evidence unless it is embodied in a marine policy in accordance with this Act.' If, as is admitted, this document be a certificate only and not a policy, it therefore seems not even to be admissible in evidence before me. If the certificate does not fall within the Marine Insurance Act it appears to be only assignable if at all by writing in

accordance with the provisions of the Judicature Act, 1873, s. 25, sub-s. (6). The certificate may have less legal effect than a slip, as to which see Arnould, s. 34, and the Marine Insurance Act, 1906, s. 21 (*z*).

"I mention these considerations briefly. Time does not permit to discuss them further and to develop their significance, or to emphasize the points arising under sects. 91—95 of the Stamp Act, 1891 (*a*). In my view the Act of 1906 deals with marine policies. It does not, I think, cover other documents, although they may be said to be the 'business equivalent' of policies. I do not think that the Act of 1906 covers the document now before me. In my humble view a document of insurance is not a good tender in England under an ordinary c.i.f. contract, unless it be a policy, and unless it falls within the provisions of the Marine Insurance Act, 1906, as to assignment and otherwise. . . . It may well be that this decision is disturbing to business men. It is my duty, however, to state my view of the law without regard to mere questions of convenience.

"I desire to add four remarks: (1) That there is no finding or evidence before me of any course of dealing between the parties. (2) That there is no finding or evidence before me of any custom or general usage which modifies the long and clearly established legal rights of

(*z*) When a stamped policy has been duly issued, reference may be made to the slip for the purpose of showing when the contract was concluded, or for the purpose of rectifying or avoiding the policy (see sects. 21, 23, 89), but no action can be maintained in this country upon the implied promise to grant a policy when the slip is initialled; *contra* where the revenue laws do not prevent it.

(*a*) Sect. 91 provides that for the purposes of the Act the expression "policy of insurance" includes every writing whereby any contract of insurance is made or agreed to be made or is evidenced. Sect. 92 defines a policy of insurance for the purposes of the Act as meaning any insurance on a ship or vessel, or goods on board, &c. By sect. 93, a contract of sea insurance is not valid unless expressed in a policy of sea insurance specifying particulars of the insurance. By sect. 95, no policy is valid unless it is duly stamped.

a buyer under a c.i.f. contract. If any such custom or usage be asserted, then the point can be dealt with in some future action in the commercial Court. Whether such an assertion can be proved may well be a question of doubt in view of the matters appearing in the *Manbre Saccharine Case* (*b*); see, too, *Wilson, Holgate & Co.'s Case* (*c*), where Bailhache, J., said: 'I am not satisfied that since *Ireland* v. *Livingston* was decided any custom has arisen which obviates the necessity for a tender by the seller of a policy of insurance if the buyer requires it.' (3) It may well be that legislation is needed to enlarge the operation of . . . . the Marine Insurance Act, 1906. (4) It may well be also that the greater part of the difficulties indicated in this judgment can be easily, promptly, and effectively met by the insertion of an appropriate clause in c.i.f. contracts."

In *Donald H. Scott & Co., Ltd.* v. *Barclays Bank, Ltd.* (*d*), a Dutch firm bought from an English firm a quantity of ship's plates c.i.f. Rotterdam. Payment was to be made by the buyers opening a banker's credit in favour of the sellers in London. The buyers opened a credit with Barclays Bank in London, and the latter notified the sellers that they were prepared to honour the sellers' drafts upon terms specified, which included the requirement that the sellers should present "an *approved insurance policy* covering a shipment including war risk." The sellers tendered an American certificate of insurance. It was a certificate of the Firemen's Fund Insurance Company, and was stated on the face of it to represent and take the place of the policy. It was expressed to be "subject to the full terms of the policy in respect of being free from claim in respect of capture, seizure, detention or the consequences of hostilities" . . . "This

(*b*) (1919) 1 K. B. 198, 216, *ante*, p. 88.
(*c*) (1920) 2 K. B. 1, at p. 8, *ante*, p. 89.
(*d*) (1923), 28 Com. Cas. 253 (C. A.).

certificate is hereby extended to cover war risk in accordance with the terms, valuations and conditions of open policy and war risk indorsement attached hereto" . . . "shipped on board S.S. 'Capulin' and/or subsequent steamers (as per conditions of policy)." The bank declined to honour the drafts against this certificate, and for their refusal to do so the sellers brought an action for damages. Sankey, J., held that the certificate amounted to an approved insurance policy within the meaning of the contract between the sellers and the bank, but his decision was reversed by the Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), who held that a certificate of insurance which did not state the terms of the insurance was not an approved policy within the terms of the credit. The Court approved the decisions in *Wilson, Holgate & Co.* v. *Belgian Grain and Produce Co.* (*supra*), and *Diamond Alkali Export Corporation* v. *Bourgeois* (*supra*). With regard, however, to Bailhache, J.'s, statement in the former case that American certificates of insurance are equivalent to policies, and are accepted in this country as policies, very guarded opinions were expressed. Bankes, L.J., said (*e*): "What form of American certificate the learned judge had in mind at the time he made that statement I do not know. It may be that he had in mind a form of certificate which contains all the essential terms which are required to constitute a good policy of marine insurance according to English law; if he had, it may well be that such a document as that is the exact equivalent of a policy of insurance expressed according to English form. I myself express no opinion upon it, but I think that the learned judge's view must not be accepted as a view which covers American certificates of insurance in whatever form they are expressed." With regard to the certificate in question, he said (*f*): "Now all that is indicated by that certificate is that a policy has been

(*e*) (1923), 28 Com. Cas. 253 (C. A.), at p. 257.
(*f*) *Ibid.* at p. 258.

issued, but what the terms of that policy are, what the risks covered are, what the conditions of the policy with reference to shipments are, it is impossible to ascertain. Those things can only be ascertained by the production of some document which did not accompany the certificate, and as to the terms of which the bank must be and remain perfectly ignorant." He approved and applied the language of McCardie, J., in *Diamond Alkali Corporation* v. *Bourgeois* (cited *supra*, p. 94): "I do not see how the buyer here could know whether the document he got was of a proper character (one he was bound to accept) unless he saw the original policy and examined its conditions, whether usual or otherwise"; but he reserved his opinion on the question discussed by McCardie, J., in the extract from his judgment set out *supra*, whether the certificate complied with the English law in reference to marine policies.

Scrutton, L.J., said (*g*): "Now the point on which I propose to decide this case is whether Messrs. Scott tendered an approved insurance policy. I take the meaning of that to be the same as the meaning which has been given to 'approved bill,' which has substantially been defined by Lord Ellenborough in *Hodgson* v. *Davies* (*h*) as a bill to which no reasonable commercial objection can be taken, and which therefore ought to be approved. . . . Now what was tendered in this case was a document called an American certificate. I am not deciding that all American certificates are a bad tender." He then referred to the terms of the certificate, and continued: "The result is that when this document is tendered to the bank they cannot tell by reading it what are the terms of insurance

(*g*) *Ibid.* at p. 261.

(*h*) (1810), 2 Camp. 531. In *Ralli* v. *Universal Marine Insce. Co.* (1862), 31 L. J. Ch. 313, the expression was "policies of insurance effected with approved underwriters, but for whose solvency the sellers are not to be responsible." So also in *Arnhold Karberg & Co.* v. *Blythe*, (1915) 2 K. B. 380; (1916) 1 K. B. 495 (C. A.).

which they are offered. In my view they have a right to see a document or documents which contain the terms of the insurance which is offered to them as security for the loss of the goods, and if the document tendered to them does not show them what the terms of that insurance are, they are, from a commercial point of view, reasonable in refusing to approve it or accept it as a policy. . . . I am not deciding that a certificate which does show all the terms of the insurance and which can be sued on in the United States is a bad tender."

Atkin, L.J., stated that an "approved policy means a policy such that no reasonable objection could be taken to it by commercial men," and proceeded to say (*i*): "Upon that footing it appears to me that it is in every sense a reasonable objection to a document which comes masquerading as a policy to say, 'This is not a policy at all, and does not purport to be one; it only purports to certify that a policy has been issued.' That is a good objection to such a document; and then you have the further fact that the so-called policy does not contain on the face of it the terms of the actual contract of insurance. It does not contain the risks against which the insuring company purport to insure the assured, and indeed it contains no means of ascertaining what the terms of insurance are except by reference to a document which is not produced and is not within the convenient reference of the person to whom the certificate is produced. Even if the terms were within easy reference I am far from saying that that in itself would prevent the objection from being a valid one. But as it is, inasmuch as a bank who do rely upon the policy of insurance to cover them against loss in case they have no recourse against the customer who has asked them to give the credit have no means of ascertaining to what extent they really are covered by the policy, it seems to me to be a perfectly valid and reasonable

(*i*) 28 Com. Cas. at p. 264.

objection. I agree, therefore, that upon that ground the documents were rightly rejected."

The conclusion from the cases cited appears to be that (1) there is at present no custom which obviates the necessity for tender of a policy by the seller; (2) a broker's cover note or a document called a certificate of insurance which does not contain all the terms of the insurance is not equivalent to a policy and will not suffice as tender, unless the buyer has contracted to accept it; (3) whether a certificate of insurance which contains all the terms of the insurance will suffice remains undecided, but, unless, at least, it is such that the insurer can be sued upon it, it is probably not a good tender.

Policy must be valid.

The policy must be a valid policy; otherwise it will not be available for the benefit of the buyer (*k*). The seller c.i.f. contracts to give the buyer a valid policy. In *Cantiere Meccanico Brindisino* v. *Constant* (*l*), where it was argued for the seller that there was no implication of a warranty as to the policy being valid, the contract was for the sale of a floating dock at a price including cost of towage from Avonmouth to Brindisi, cost of insurance, and all fittings, &c. necessary for the voyage, and it contained the clause "before the dock leaves, vendors agree to hand to purchasers Lloyds' policies of insurance for 16,500*l*. This insurance will be duly endorsed over to them and they shall receive the full benefit of such policies." Insurances were effected against the usual risks, "seaworthiness admitted." The dock was not in fact seaworthy and it sank and was lost. The underwriters set up the defence to a claim on the policies that the policies were void on the ground of concealment

(*k*) *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 214, at p. 220; *ibid.* at p. 956; *Johnson* v. *Taylor Bros. & Co., Ltd.*, (1920) A. C. 144, at p. 156. See, further, as to validity at the time of presentation of documents, *post*, Ch. IV., p. 111.

(*l*) (1912), 17 Com. Cas. 182; affirmed on appeal, *ibid.* 332, but the *dictum* of Scrutton, J., was not referred to.

of a material fact, viz., that the dock was sent on the voyage without necessary additional strengthening. Scrutton, J., held on the facts that the defence failed, but he said that if he had set the policies aside he should have found that the contract was a contract to give valid policies, that the contract had been broken and that the seller would have been liable in damages for the amount which the buyers failed to recover from the underwriters.

So the seller does not satisfy his obligation by procuring a p.p.i. or honour policy (*m*). Such a policy cannot be put in suit and the buyer may properly object to it on that ground.

The question of the validity of the documents is further considered in the next chapter (p. 111).

Solvency of insurers.

Whether the seller c.i.f. contracts that at the time of tender of the documents the insurers will be solvent does not appear to have been discussed in any reported case. That he contracts to procure an insurance with responsible insurers is clear; but so far as the writer is aware no case has arisen for legal discussion where between the time of issue of the policy and presentment of it to the buyer the insurers have failed. In a few cases, of which examples have been mentioned (*ante*, p. 99, n. (*h*)), the contracts have stipulated that the seller is not to be

(*m*) The Marine Insurance Act, 1906, s. 4, is as follows:—

"(1) Every contract of marine insurance by way of gaming or wagering is void.

"(2) A contract of marine insurance is deemed to be a gaming or wagering contract—

"(a) Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest; or

"(b) Where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without benefit of salvage to the insurer,' or subject to any other like term:

"Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer."

responsible for the solvency of underwriters. It may be said that the seller who tenders a policy of insurance with insurers who have failed subsequently to its issue does not fulfil his bargain that "at the date of the tender the documents must be valid and *effective* documents" (*n*). But probably the true view is that while he contracts that the contract of insurance shall be effective in the sense of being capable of enforcement, he does not guarantee that at the time of tender, or at any time, the full measure of indemnity granted by the policy shall be recoverable.

The right to excess insurance.

Questions have arisen as to who is entitled to receive, in case of loss, any excess insurance effected by the seller. In *Ionides* v. *Harford* (*o*) a ship was chartered to load with grain from Galatz to Emden for orders to discharge at a United Kingdom port. The owners effected an insurance on the cargo from Galatz to Emden, and thence to a port of discharge in the United Kingdom, with leave to call for orders and to naturalise the cargo, to return 20*s*. per cent. if risk ends at the port of naturalisation. The cargo was sold afloat while on the voyage from Galatz to Emden for 60*s*. per quarter, "including freight and insurance to Emden." The bill of lading (which was in conformity with the charterparty) and the policy of insurance were delivered to the buyer. A loss having occurred between Emden and a port of discharge in the United Kingdom the question arose as to whether the buyer could recover from the underwriter for the loss. It was held (Pollock, C.B., Bramwell, Watson and Channell, B.B.) that the purchaser was only entitled to the insurance to Emden.

In *Ralli* v. *Universal Marine Insurance Co.* (*p*), sellers shipped a cargo of wheat at Odessa for England, valued at 7,000*l*., and effected two policies of insurance, for

(*n*) *Per* Swinfen Eady, L.J., *Arnhold Karberg & Co.* v. *Blythe*, (1916) 1 K. B. at p. 508; and see Ch. IV., p. 111 *et seq.*

(*o*) (1859), 29 L. J. Ex. 36.

(*p*) (1862), 31 L. J. Ch. 313.

4,000*l.* and 3,000*l.* respectively. The cargo fell in value and it was sold afloat for 5,358*l.* including freight and insurance, payment to be in exchange for bills of lading and policies of insurance effected with approved underwriters. The sellers endorsed on the policy for 3,000*l.*: "We transfer this policy to (the buyer) to the extent of 1,700*l.*" The shipping documents with the policies were duly delivered to the buyer. The ship and cargo having been lost the buyer claimed and received the 4,000*l.* on the first policy, but of the 3,000*l.* insured by the second policy the sellers objected to his claim to receive more than 1,700*l.* and claimed the remaining 1,300*l.* for themselves and brought action against the insurance company and the buyer, claiming to be entitled to receive that amount, which the insurance company then brought into Court. Knight Bruce and Turner, L.JJ., reversing the decision of Wood, V.-C. (*q*), held that the whole of the 3,000*l.* belonged to the buyer on the ground that on the construction of the contract the sale was of the wheat as already insured by the sellers (*r*).

A similar question arose in the case of *Landauer* v. *Asser* (*s*) in a different form. There a contract of sale c.i.f. contained the clause "Insurance 5 per cent. over net invoice amount to be effected by sellers for account of buyers." The sellers effected a policy of insurance for a larger amount than 5 per cent. over the net invoice amount and delivered the policy with the other documents to the buyers against payment of the price. A

(*q*) (1862), 31 L. J. Ch. 207.

(*r*) Arnould on Marine Insurance, commenting on this case, says: "The defendants (the underwriters) had paid the full amount into Court in the first instance; if they had not adopted this course and the judgment of the learned Vice-Chancellor against the vendee's claim had been affirmed, it is difficult to understand upon what principle in law the *vendor* would have based his claim to the balance"; cited with approval by Kennedy, J., in *Landauer* v. *Asser*, (1905) 2 K. B. 184, at p. 195.

(*s*) (1905) 2 K. B. 184.

loss having occurred the underwriters were prepared to pay the buyers upon the whole of the amount insured, but the sellers objected. The question for decision was whether the purchasers, as regards the amount received by them in excess of their loss, were trustees for the sellers. The Court (Alverstone, L.C.J., Kennedy and Ridley, JJ.) held that the purchasers were entitled to retain the whole amount received by them. The basis of the decision was that the sellers had no interest in the subject-matter of the insurance at the time of the loss and could not make any valid claim against the underwriters. But no opinion was expressed as to whether the purchasers could require the underwriters (who were not parties to the proceedings) as a matter of legal right to pay them the excess of their loss.

In *Strass* v. *Spillers & Bakers, Ltd.* (*t*) the defendants bought a wheat cargo at a price "including freight and insurance" under a contract which contained the clause "Seller to give policies of insurance (free of war risk) for 2 per cent. over the invoice amount, and any amount over this to be for seller's account in case of total loss only." In order to fulfil the contract the seller bought a cargo of wheat from a person to whom the plaintiff had sold it, the contracts throughout being in the same form and containing the last-mentioned clause. The plaintiff delivered to his buyer a policy for 2 per cent. over the invoice amount, and this policy was delivered to the defendants. The plaintiff, before selling the cargo, had taken out an honour policy on increased value of the wheat for his own benefit, and that policy he retained in his own possession. A loss occurred, and the insurers paid the defendants the full amount under the policy which had been delivered to them. The plaintiff then sent the increased value policy to the defendants, requesting them to collect from the insurers the amount

(*t*) (1911) 2 K. B. 759.

payable thereunder. The defendants did so, and upon being paid the amount by the insurers they claimed to retain it upon the ground that under the contract of sale the plaintiff was bound to hand over all policies effected on the wheat at the time when he entered into the contract of sale. In an action by the plaintiff to recover the amount as money had and received to his use, Hamilton, J., held that the contract was made in view of insurances to be thereafter effected, and not, as was the case in *Ralli* v. *Universal Marine Insurance Co.* (*u*), so as to affect policies already effected, that the increased value policy was an independent honour policy effected by the plaintiff for his own benefit, and the defendants were not entitled to it under the contract.

(*u*) See *ante*, p. 103.

CHAPTER IV.

TENDER AND PAYMENT.

Time of tender.

THE seller having procured the necessary documents, namely, a contract of affreightment and policy of insurance, and any other documents required by custom or by the terms of the contract, is under an obligation to send them forward to the buyer, accompanied by an invoice showing the amount due from the buyer, within a reasonable time. He must make every reasonable exertion to send them forward so soon as possible after he has destined the goods shipped to the buyer.

In *Barber* v. *Taylor* (*a*), where the seller was to deliver to the buyer a bill of lading for 150 bales of cotton which had been bought on the buyer's orders, the Court (Lord Abinger, C.B., Parke, Gurney and Rolfe, BB.) held that the seller was bound to deliver the bill of lading within a reasonable time after its receipt, without reference to the arrival or unloading of the cargo, and that, there having been an unreasonable delay in delivering the bill of lading, the buyer was entitled to reject the cotton.

"Merchants never could have contemplated," said Brett, M.R., in *Sanders* v. *Maclean* (*b*), "that after a

(*a*) (1839), 9 L. J. Ex. 21. And see *Borrowman* v. *Free* (1878), 4 Q. B. D. 500.

(*b*) (1883), 11 Q. B. D. 327, at p. 337; adopted by Kennedy, L.J., *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 934, at p. 958 (as explained by Atkin, J., *C. Sharpe & Co.* v. *Nosawa & Co.*, (1917) 2 K. B. 814, at p. 819). In *Biddell Bros.' Case* in the House of Lords ((1912) A. C. 18, at p. 23), Lord Loreburn said: "Now, in this contract there is no time fixed at which the seller is entitled to tender the bill of lading. He therefore may do so *at any reasonable time*."

cargo had been destined to a purchaser or consignee the shipper should keep the bill of lading as long as he pleased. Therefore, some stipulation with regard to this must be implied. The stipulations which are inferred in mercantile contracts are always that a party will do what is mercantilely reasonable. What then is the contract duty which is to be imposed by implication on the seller of goods at sea with regard to the bill of lading? I quite agree that he has no right to keep the bill of lading in his pocket, and when it is said that he should do what is reasonable, it is obvious the reasonable thing is he should make every reasonable exertion to send forward the bill of lading as soon as possible after he has destined the cargo to the particular vendee or consignee. If that be so, the question whether he has used such reasonable exertion will depend upon the particular circumstances of each case. If there is a perishable cargo, or one upon which heavy charges must surely be incurred, the reasonable thing for him to do is to make even a greater exertion than he would in the case of another cargo. That is one of the circumstances to be considered. Another circumstance would be: from whence is the shipment? How near is the consignor of the ship so as to enable him to get possession of the bill of lading"?

The seller, said Scrutton, J., in *Landauer & Co.* v. *Craven and Speeding Bros.*, "must, as soon as possible after he has sent forward the cargo, send forward the documents to the vendee or consignee" (*c*). He is bound to tender the documents to the buyer "within a reasonable time after shipment," said Lord Birkenhead, and "with all reasonable despatch," said Lord Atkinson, in *Johnson* v. *Taylor Bros. & Co., Ltd.* (*d*).

Either the expression "at any reasonable time" means within a reasonable time after shipment, or it does not strictly represent the seller's obligation, which is to present the documents with all reasonable despatch.

(*c*) (1912) 2 K. B. 94, at p. 105.

(*d*) (1920) A. C. 144, at pp. 149, 156.

Accordingly, when in *C. Sharpe & Co.* v. *Nosawa & Co.* (*e*), the damages had to be assessed in an action for non-fulfilment by sellers of a c.i.f. contract for the sale of goods to be shipped in June from Japan to London, and it was proved that the documents relating to the last possible shipment in June would, if sent forward with reasonable despatch, have reached London on July 21st, Atkin, J., measured the damages by the difference between the contract price and the price about July 21st. "The contract is performed in fact, and the date of its performance is the date when the documents would come forward, the vendor making every reasonable effort to forward them" (*f*).

For the buyer, by getting the documents into his hands at the earliest possible moment, "obtains the privilege and absolute power of profitably dealing with the goods days or weeks, or perhaps, in the case of shipments from a distant port, months before the arrival of the goods themselves. This is, indeed, the essential and peculiar advantage which the buyer of imported goods intends to gain under the c.i.f. contract" (*g*).

But there is no condition implied in the contract that the seller shall deliver the documents to the buyer in sufficient time to enable the buyer to send on the bill of lading to meet the arrival of the ship, or in time to reach the place of discharge before charges on the goods are incurred there. "It is impossible, to my mind," said Brett, M.R., in *Sanders* v. *Maclean* (*h*), "to say that even a stipulation"—as distinct from a condition—"ought to be implied in the contract that the bill of lading should be delivered so that it may arrive before or at the time of the arrival of the ship or before charges are incurred."

(*e*) (1917) 2 K. B. 814; and see *post*, p. 155.
(*f*) *Ibid.* at p. 819.
(*g*) *Per* Kennedy, L.J., *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 934, at p. 958.
(*h*) (1883), 11 Q. B. D. 327, at p. 337.

Place of tender.

The place of tender of the shipping documents is, it is submitted, unless the contract otherwise provides, *the buyer's* place of business or residence. Atkin, J., in *Stein, Forbes & Co.* v. *County Tailoring Co.* (*i*), where payment was to be "net cash against documents on arrival of the steamer," expressed doubt whether there was an obligation on the seller to tender them at the buyer's office in the absence of any express stipulation to that effect, or some trade usage or course of business between the parties importing such a stipulation. He cited sect. 29 (1) of the Sale of Goods Act, 1893, as apparently providing the contrary. That section says: "Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery." But it is a little difficult to see what the alternative is. The authorities cited (*k*) show that the seller is under an obligation to send forward and tender the documents to the buyer. To do this he may transmit them by mail direct to the buyer, or he may transmit them to his agent for presentation, or he may discount the bill of exchange drawn on the buyer with his banker, leaving the banker to forward the documents to his agent at the place of payment for collection of the acceptance or the price, as the case may be. In the latter cases the seller's agent or the banker's agent may merely notify the buyer

(*i*) (1916), 115 L. T. 215.

(*k*) *Ireland* v. *Livingston* (1871), L. R. 5 H. L. 395, 406; *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 934, 962; (1912) A. C. 18; *Sharpe & Co.* v. *Nosawa Co.*, (1917) 2 K. B. 814 (a decision of Atkin, J.).

that the documents are ready, leaving the buyer to call and take them up, or he may actually seek out and present the documents to the buyer. In these circumstances, if any defined obligation is to be implied in the contract, it is suggested that practical convenience supports the implication of an obligation to tender at the buyer's place of business or residence. It is suggested that either there is an implied contract "for the seller to send them to the buyer," or the section of the Act quoted has no reference to the tender of documents under a c.i.f. contract. Lord Atkinson has stated (*l*) that the result of the cases (*m*) establishes "that if no place be named in the c.i.f. contract for the tender of the shipping documents, they must *primâ facie* be tendered at the residence or place of business of the buyer." But examination of the cases referred to does not reveal any direct decision to the effect stated, and in the absence of direct authority the point may, perhaps, be still considered an open one.

Demand or tender of delivery of documents must be made at a reasonable hour, which is a question of fact (*n*), and unless so made may be treated as ineffectual (*n*).

Validity of documents at time of tender.

The documents must be valid and effective at the time of the tender. The tender of documents which were originally valid but before tender have become invalid is not a good tender. Reference has already been made to the case of *Cantiere Meccanico Brindisino* v. *Constant* (*o*), where the validity of policies of insurance on a floating dock effected by the seller was challenged by the underwriters on the ground of concealment of the fact that the dock required extra strengthening, and Scrutton, J., while refusing to set aside the policies,

(*l*) *Johnson* v. *Taylor Bros. & Co., Ltd.*, (1920) A. C. 144, at p. 156.

(*m*) The cases referred to are those mentioned in the extract from his judgment, quoted *ante*, p. 24, viz., *Ireland* v. *Livingston, Biddell Bros.* v. *E. Clemens Horst Co., C. Sharpe & Co.* v. *Nosawa & Co.*

(*n*) Sale of Goods Act, 1893, s. 29 (4).

(*o*) (1912), 17 Com. Cas. 182; C. A. 332.

said that if he had set them aside he would have found that there was a contract on the part of the seller to give valid policies and the contract would have been broken. The law on the point has been clearly laid down in the following cases:—

In *Arnhold Karberg & Co.* v. *Blythe* and *Theodor Schneider & Co.* v. *Burgett and Newsum* (*p*) there were two contracts for the sale of beans to be shipped from Chinese ports to Naples and Rotterdam respectively, each of which provided that payment was to be made in net cash in London on arrival of the goods at the port of discharge in exchange for bills of lading and policies of insurance, but payment was to be made in no case later than three months from the date of the bills of lading or upon posting of the vessel at Lloyd's as a total loss. The beans were shipped on German vessels in July, 1914, and on the outbreak of war between Great Britain and Germany on August 4th, 1914, these vessels entered ports of refuge where they remained. At the expiration of three months from the date of the bills of lading the sellers tendered to the buyers the documents which included in one case a German bill of lading and an English policy of insurance, and in the other case a German bill of lading and a German policy of insurance. The buyers in each case refused to accept the tender and pay for the goods. It was argued on their behalf that the contract of affreightment was rendered void on the outbreak of war, or, if it was not, to become party to it would involve trading with the enemy, and that the tenders were therefore bad. The same argument was applied to the policy in the second case. The substantial argument for the sellers was that it was immaterial that the contract of affreightment became void on the outbreak of war, for this was immaterial in a c.i.f. contract; that after the seller ships the goods and obtains

(*p*) (1915) 2 K. B. 379; C. A., (1916) 1 K. B. 495.

contracts of affreightment and insurance, the goods and the contracts are at the buyers' risk; that it is immaterial that the parties contracting to carry subsequently become alien enemies so that the contracts are void, or otherwise become inoperative, unenforceable, or useless; that the risk is the buyers', and they must insure against war risk.

Scrutton, J., before whom the issue came on a special case stated by arbitrators, on the question as to "what condition and validity of these documents were required to make them a good tender," held that on the 4th August the contracts of affreightment and the German policy of insurance became void except as regards claims then accrued, if any, which, however, could not be enforced during the war; that when the sellers tendered the documents they tendered documents which had been contracts, but which were then, by considerations of public policy, void and unenforceable as regards any obligations of performance which would, but for the war, have been carried out after the 4th August. "I cannot believe," he said (*q*), "that contracts which are illegal and void can be regarded as good tenders, and available for the benefit of the buyer. It is clearly not essential that if the goods do not arrive, the buyer should have a good claim on one of the contracts, but I think it is essential that each contract should be one into which he can legally enter as a contracting party, and when the legal relations of the seller under the contract of affreightment tendered have become void, and it is illegal for the buyer to enter into any similar relations with shipowner or insurer, I cannot hold that such documents are good tender, or that the buyer can be required to pay against them."

The decision was affirmed by the Court of Appeal (Swinfen Eady, Bankes and Warrington, L.JJ.). Swinfen Eady, L.J., in the course of his judgment

(*q*) (1915) 2 K. B. at p. 392.

said (*r*): "The point is upon whom is the loss to fall where documents which were originally valid have become invalid before they were tendered. In my opinion, although there is no direct authority on the point, the decisions which have been given as to the effect of c.i.f. contracts, and the language which is used in those cases makes it reasonably clear what the obligation of the seller is. . . . In my opinion the cases dealing with c.i.f. contracts have all proceeded upon the footing that upon delivery of the shipping documents the purchaser will obtain a right either to the goods or, if the goods are lost or damaged, to such claims in respect of the goods as the shipping documents may entitle him, not necessarily covering every loss or damage, but they were to be effective documents; and I think that the language used by the judges in dealing with c.i.f. contracts is only consistent with the view that the documents tendered are to be effective shipping documents, and that where the bill of lading has become avoided by war it is not a sufficient compliance with the contract to tender it . . . that at the date of the tender the documents must be valid and effective documents."

Bankes, L.J., said (*s*): "What is the meaning of the buyer's contract that he is to pay in exchange for a bill of lading? In my opinion it means what it says, that in exchange for the price he is to receive a bill of lading which is still a subsisting contract of affreightment of the goods to the port of destination, and a policy or policies of insurance which is, or are still, a subsisting contract, or subsisting contracts of insurance. It is said that this construction, which seems to me so obviously the natural construction, ignores the fact that in a contract of this kind certain risks do fall upon the buyer. For instance, in the present cases all war risks

(*r*) (1916) 1 K. B. at pp. 504, 506, 508.
(*s*) *Ibid.* at p. 509.

fell on the buyer, as the parties have agreed that the seller shall be under no obligation to obtain policies covering war risks (*t*). I agree also that the condition of the goods at the time of the tender of the shipping documents is not material, nor is the value of the documents at the time of tender material. In all such matters the risk is on the buyer. He may be obliged to pay for goods although they may be at the bottom of the sea, or although through some unforeseen circumstance they may never arrive, or although they may have been lost owing to some cause not covered by the agreed form of policy. All these risks, however, are risks affecting the goods. In effect the contention of the appellants appears to me to be a contention that one of the risks undertaken by a buyer is a risk affecting his contract, and not the goods the subject-matter of the contract. I cannot agree with this view. It appears to me that the question of the construction of the contract must depend upon the language used, and not upon any such considerations as these. In the present case it is not disputed that the outbreak of war dissolved the contract of affreightment, and that so far as any further prosecution of the voyage was concerned the bill of lading was no longer an effective document. Under those circumstances, in my opinion, that bill of lading was not a bill of lading within the meaning of the contract in respect of which the seller was under an obligation to pay cash in exchange."

And Warrington, L.J., said (*u*): "Is the obligation of the seller which he has to fulfil performed by delivering what he has purported to deliver in the present case—a document which does not entitle the buyer to obtain delivery of the goods because the contract of affreightment

(*t*) Normally, war risks, independently of express agreement, fall upon the buyer. See *ante*, p. 77.

(*u*) (1916) 1 K. B. at p. 514.

has ceased to be effective? In my opinion quite plainly not. In order truly to perform his contract he has to deliver documents by virtue of which the buyer may, if the goods are in existence, obtain delivery of them, and by virtue of which, if the shipowner has not fulfilled his obligation imposed by the contract of affreightment, he, the buyer, may have such remedies as the contract of affreightment would give him. Neither of those conditions is fulfilled by the delivery of a document evidencing a contract which has been dissolved by the outbreak of war, and the further performance of which has become impossible."

In *Duncan Fox & Co.* v. *Schrempft & Bonke* (*x*) English sellers sold in 1914 to English buyers about 300 barrels June and/or July shipment Chilian honey c.i.f. Hamburg, payment net cash in Liverpool in exchange for shipping documents. The honey was shipped in June on a German steamer, "Menes," for Hamburg. A clause was endorsed on the bill of lading providing that all questions thereunder were to be governed by German law and to be decided at Hamburg. War between Great Britain and Germany broke out on August 4th, and on August 5th a Proclamation was issued directed against British subjects trading with the enemy, and on the same day the shipping documents were tendered to the buyers, who refused to accept them. The "Menes" had not then arrived at Hamburg. It was held by Atkin, J., that the buyers were entitled to refuse the tender because by accepting the documents they would be carrying out a contract in violation of the Proclamation.

In *C. Weis & Co., Ltd.* v. *Crédit Colonial et Commercial, Antwerp* (*y*), performance of the contract involved no illegality, and the tender was upheld. There a contract was entered into before the war between an English com-

(*x*) (1915) 1 K. B. 365. (*y*) (1916) 1 K. B. 346.

pany and Belgian buyers for the sale of bean oil to be shipped from an Eastern port c.i.f. to Antwerp. Some of the goods were shipped on a British steamer which, on the outbreak of war, was seized by the Germans on the high seas and taken to Hamburg. At a subsequent date the shipping documents were tendered to and rejected by the buyers. Bailhache, J., held that the tender was a good tender, since there was no illegality as between the sellers and the buyers in tendering documents calling for delivery at Antwerp (which was not then in the possession of the Germans), and the inability of the buyers to get the goods owing to the seizure of the steamer by the Germans did not affect the validity of the tender; it was a war risk against which the buyers could have protected themselves by insurance.

So also tender of a forged bill of lading would be a bad tender. But a banker who having discounted the seller's bill of exchange drawn upon the buyer, presents it to the buyer for acceptance or payment, with the shipping documents attached, does not by English law warrant or represent to the buyer the genuineness of the bill of lading, and if the bill of lading be a forged one, he is under no liability to the buyer to refund the price paid by him (*z*).

Loss of or damage to goods at time of tender.

It is immaterial to the seller that at the time of tender the goods shipped have been damaged or lost in transit. The seller fulfils his obligation by delivering to the buyer the shipping documents, ordinarily the bill of lading, invoice and insurance policy. It is contemplated that the buyer will obtain an indemnity in respect of the damage or loss under one or the other documents, though whether he is able to do so depends upon the terms of the bill of lading and policy, and the circumstances of the damage or loss (*a*). In *C. Groom, Ltd.* v. *Barber* (*b*), where, as in

(*z*) *Guaranty Trust Co. of New York* v. *Hannay,* (1918) 2 K. B. 623 (C. A.), following *Leather* v. *Simpson* (1871), L. R. 11 Eq. 398.

(*a*) See judgments quoted in Ch. I.

(*b*) (1915) 1 K. B. 316.

the common case, there was no appropriation of the goods by the seller to the particular buyer until the tender of the documents, and before that time the goods had been lost, it was unsuccessfully argued on behalf of the buyer that the seller could not recover where there was no appropriation of specific goods to the contract so as to pass the property before tender, and at that time the goods were lost. Atkin, J., in rejecting this argument, said (*c*): "The contract of the seller is performed by delivering to the buyer within a reasonable time from the agreed date of shipment the documents, ordinarily the bill of lading, the invoice, and the policy of insurance, which will entitle the buyer to obtain on arrival of the ship delivery of goods shipped in accordance with the contract, or in case of loss will entitle him to recover on the policy the value of the goods if lost by a peril agreed in the contract to be covered, and in any case will give him any rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It therefore becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's, or some third person's. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender. If it were otherwise the shipper of goods in bulk, or of goods intended for several contracts, or the intermediate seller who may be the last of a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms. The seller's obligation cannot depend upon whether the goods are lost or not, and if when there is no loss the property has to pass to the buyer before delivery of the

(*c*) (1915) 1 K. B. at p. 324.

documents, at what stage of the transaction must it pass? Unless it be at the time of shipment, I can see no reason for fixing upon any other time than on delivery of the documents, and if it be the law that a tender of documents is ineffectual unless in fact at the moment of shipment the property actually passed to the ultimate buyer, it appears to me that business operations would be very seriously embarrassed."

It makes no difference to the legal position if the fact be that the seller at the time of the tender of the documents knows that the goods have been lost. In *Manbre Saccharine Co.* v. *Corn Products Co.* (*d*), there were contracts for the sale of starch and syrup c.i.f. London. On the 12th March, 1917, the S.S. "Algonquin," carrying a portion of the goods, was sunk by submarine or mine. The sellers, with knowledge of the loss, tendered the documents to the buyers on the 14th March. It was held that the sellers' knowledge of the loss was immaterial. "If," said McCardie, J. (*e*), "the vendor fulfils his contract by shipping the appropriate goods in the appropriate manner under a proper contract of carriage, and if he also obtains the proper documents for tender to the purchaser, I am unable to see how the rights and duties of either party are affected by the loss of ships or goods, or by knowledge of such loss by the vendor prior to the actual tender of the documents. If the ship be lost prior to tender, but without the knowledge of the seller, it was, I assume, always clear that he could make an effective proffer of the documents to the buyer. In my opinion it is also clear that he can make an effective tender even though he possess

(*d*) (1919) 1 K. B. 198. The contract in *Olympia Oil Co.* v. *Produce Brokers Co.*, (1915) 1 K. B. 233, where it was held by a Divisional Court (Avory, Rowlatt and Shearman, JJ.) that a tender at a time when to the knowledge of the seller the goods were lost was not a good tender, was not a c.i.f. contract; and the decision was discussed and criticised in *Produce Brokers Co.* v. *Olympia Oil Co.*, (1917) 1 K. B. 320 (C. A.), and *Clark* v. *Cox, McEuen & Co.* (1920), 89 L. J. K. B. 596 (C. A.).

at the time of tender actual knowledge of the loss of the ship or goods. For the purchaser in case of loss will get the documents he bargained for; and if the policy be that required by the contract, and if the loss be covered thereby, he will secure the insurance moneys. The contingency of loss is within and not outside the contemplation of the parties to a c.i.f. contract."

The buyer, therefore, where the proper documents are tendered to him, is "obliged to pay for goods although they may be at the bottom of the sea, or although through some unforeseen circumstance they may never arrive, or although they may have been lost owing to some cause not covered by the agreed form of policy" (*f*), and whether the seller was or was not aware of loss at the time of tender.

All the documents must be tendered.

All the documents required by the contract must be tendered. The omission of any one of them places the buyer in the position to reject, even though the goods have already arrived in safety. "The invoice is made out debiting the consignee with the agreed price . . . and giving him credit for the amount of the freight which he will have to pay to the shipowner on actual delivery, and for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charter-party, bill of lading, and policy of insurance" (*g*). This final duty of the seller is necessary in order that the buyer "may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover their loss if they are lost on the voyage" (*h*). "A tender of delivery entitling the vendor to payment of the price must, in the absence of contractual stipulation to the contrary, be a tender of possession. How is such a tender to be

(*f*) *Per* Bankes, L.J., *Arnhold Karberg & Co.* v. *Blythe*, (1916) 1 K. B. 495, at p. 510.

(*g*) *Per* Blackburn, J., *Ireland* v. *Livingston* (1872), L. R. 5 H. L. 395, at p. 406.

(*h*) *Per* Hamilton, J., *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 214, at p. 220.

made of goods afloat under a c.i.f. contract? By tender of the bill of lading, accompanied in case the goods have been lost in transit by the policy of insurance" (*i*).

Mention has already been made of cases where the failure or alleged failure of the seller to fulfil his obligation to tender the proper documents called for by the contract has led to the buyer's rejection and refusal to pay the price (*k*).

In the case of *In re Salomon and Naudszus* (*l*) buyers rejected the documents on the ground that two of them appeared on their face to have been altered. The contract was for the sale of wheat c.i.f. Hamburg, payment net cash against documents to consist of bills of lading, policy of insurance and certificate of inspection. The sellers in due course tendered the three documents, two of which, the bill of lading and certificate of inspection,

(*i*) *Per* Kennedy, L.J., *ibid.* p. 956. In *Landauer & Co.* v. *Craven & Speeding Bros.*, (1912) 2 K. B. 94, Scrutton, J., referring to this, said (at p. 97): "I am unable to follow this *obiter dictum*. At time of tender the goods are generally at sea, and nobody on land knows whether they are afloat or at the bottom, and, in my view, the buyer is entitled to require the policy in his shipping documents, whether it is known that there has been a loss or not." But as was pointed out by Lush and Rowlatt, JJ., in *Orient Co., Ltd.* v. *Brekke,* (1913) 1 K. B. 531, at pp. 535, 537, where the limited view of Kennedy, L.J.'s words was unsuccessfully sought to be used to justify sellers' failure to effect a policy of insurance on the ground that the goods had in fact arrived in safety, Kennedy, L.J., was referring not to an ascertained past fact, but to a present risk, when he used the words "in case of loss."

(*k*) *Hickox* v. *Adams* (bill of lading and policy including other goods), *ante,* pp. 70, 86; *In re Keighley, Maxted & Co. and Bryan, Durant & Co.* (bill of lading covering other goods), *ante,* p. 71; *In re Reinhold & Co. and Hansloh* (certificate not identifying goods), *ante,* p. 72; *Landauer* v. *Craven & Speeding Bros., ante,* p. 32; and *Hansson* v. *Hamel & Horley, Ltd., ante,* p. 34 (no through bill of lading); *Orient Co., Ltd.* v. *Brekke, ante,* p. 87; *In re Denbigh, Cowan & Co. and Atcherley & Co., ante,* p. 88; *Manbre Saccharine Co.* v. *Corn Products Co., ante,* p. 88; *Wilson, Holgate & Co., Ltd.* v. *Belgian Grain & Produce Co., Ltd., ante,* p. 89; *Diamond Alkali Export Corporation* v. *Fl. Bourgeois, ante,* p. 92; *Donald Scott & Co.* v. *Barclays Bank, Ltd., ante,* p. 97 (no policy); *post,* p. 125 (one out of three bills of lading missing).

(*l*) (1899), 81 L. T. 325.

contained erasures and alterations, the third, a certificate of insurance, being unaltered. The buyers refused to accept by reason of the alterations. It appeared that the two altered documents had been altered before execution and to correct a mistake as to the holds in the ship in which the wheat was stowed, and that as altered they conformed with the certificate of insurance and with the facts. The Committee of the London Corn Trade Association found "that the documents were a fit and proper tender under the contract and ought to have been accepted by the buyers."

On a special case stated for the opinion of the Court, Darling and Phillimore, JJ., differed. Darling, J., held that the tender ought to have been accepted as the buyers were put on enquiry, and since one of the altered documents agreed with the unaltered one, they ought to have concluded that the altered documents were altered before execution and agreed with the facts. Phillimore, J., was of the opinion that the tender was not a good one. To the question whether the buyer is "to be compelled to take documents which may be good and probably are good, but which quite conceivably may be worthless, or, in the alternative, to incur the liability to an action if it turns out that he has rejected documents which "in fact are quite good," he answered: "I do not think that is a duty which is imposed upon a man of business; and I think it is still less so in a case of this kind, because a purchaser is entitled to require not merely what conveyancers call a good holding title, but a good marketable title—language which my brother Day paraphrased in his judgment (*Bernays* v. *Winter,* (1898) unreported (*m*)), to which I was a party, by the use of the words 'perfect document.' . . . In this class of cases a man requires a good marketable title. He is probably dealing largely on borrowed money, and he is possibly

(*m*) In that case it appears that the Court held tender of bills of lading which had been altered *after arrival* to be a bad tender.

buying to sell again. In either case he requires not only documents that would satisfy him, but documents which he can compel others to take as being satisfactory" (*n*).

Bills of lading in sets.

If, in accordance with a common practice, the bills of lading are drawn in sets of three or more, it is not necessary for the seller to present all of the set; it is sufficient if he presents any one of them effectual to pass the property. In *Barber* v. *Meyerstein* (*o*) it was decided in the House of Lords that the indorsement and transfer, with intent to pass the property of one bill of lading out of a set of three, passes the property in the goods which the bill of lading represents and that any subsequent indorsement of any other of the set is ineffective for that purpose. In *Glyn, Mills & Co.* v. *E. & W. India Dock Co.* (*p*), though the House of Lords decided that the holder of the first bill of lading could not sue the shipowner or master who had innocently delivered the goods to the holder of a subsequently indorsed bill of the set, it confirmed the old law as laid down in *Barber* v. *Meyerstein* (*supra*) with regard to passing of property by bills of lading. But in *Sanders* v. *Maclean* (*q*) an attempt was made by buyers to maintain an objection to presentation of two only out of a set of three bills of lading, though it appeared that the third had never been dealt with. In that case the sale was of 2,000 tons of iron rails, c.i.f. Philadelphia, payment to be made in cash in London in exchange for bills of lading and policies of insurance of each cargo or shipment. The rails were shipped at Sebastopol for Philadelphia on account of the sellers. Three bills of lading were signed

(*n*) *Ibid.* at p. 329. The buyer is not "buying a litigation," *ante*, p. 60. The documents must be such as to be "readily fit to pass current in commerce," *ante*, p. 38.

(*o*) (1870), L. R. 4 H. L. 317.

(*p*) (1882), 7 A. C. 591.

(*q*) (1883), 11 Q. B. D. 327. The well-known passage from Bowen, L.J.'s judgment in this case, stating the law as to indorsement and delivery of bills of lading, is set out *ante*, p. 2.

by the master of which the shipper kept one, which he did not deal with. The other two were sent to the sellers who tendered them to the buyers. The latter refused to accept them or pay for the rails on the ground that one of the bills of lading was outstanding. It was held by the Court of Appeal (Brett, M.R., Bowen and Cotton, L.JJ.) that as the third bill of lading had not been dealt with, the other two bills were effectual to pass the property and the tender was good; that if the seller endorses and parts with one of the set of bills to another person before the tender of the others, such tender is not a compliance with the contract since the bills of lading tendered would not be effectual to pass the property, but in refusing to accept the tender the buyer does so at the risk of investigation showing that the bills tendered were effectual to pass the property. "The bill of lading," said Bowen, L.J. (*r*), ". . . may be regarded as the key of the warehouse where the goods are. Can a person who has contracted to pay on delivery of the keys of the warehouse refuse to accept the keys tendered to him on the ground that there is still a third key in the hands of the vendor which, if fraudulently used, might defeat the vendee's power of taking possession? I think business could not be and is not carried on on any such principle."

In *Cederberg* v. *Borries, Craig & Co.* (*s*) the contract stipulated that the buyers should accept bills "on receipt of and in exchange for *all* the shipping documents." The word "all" had been inserted in ink in a printed form of contract at the buyers' request. The sellers were unable to supply more than three out of five parts of the bill of lading. The buyers received and disposed of the cargo, but, in an action for the price, contended that they were not liable to pay for the goods until every part of the bill of lading was delivered up to them, though they admitted that in face of *Sanders* v. *Maclean* (*supra*)

(*r*) (1883), 11 Q. B. D. at p. 343.
(*s*) (1885), 2 T. L. R. 201.

in the absence of the word "all" they could not have insisted on tender of more than one part of the bill of lading. Grove, J., after telling the jury—with apparent justification—that it was a very melancholy action, directed them to consider whether the word "all" had altered the buyers' rights, whether the words "shipping documents" had a wide or a strict technical sense. Did they mean every single piece of paper, *i.e.*, invoice, manifest and bills of lading, &c. or only such as are usually handed over? Had the plaintiffs tendered all the customary documents? Verdict for the plaintiffs and judgment accordingly.

But where the contract calls for tender of a full set of bills of lading the buyer will be entitled to reject the tender if the requirement is not fulfilled. Thus, in *Donald H. Scott & Co., Ltd.* v. *Barclays Bank, Ltd.* (*t*), where, by the terms of a sale of steel plates c.i.f. Rotterdam, the buyers were to open a credit in London, and their bank in London notified the sellers that they would honour the sellers' drafts against a full set of clean bills of lading, and the sellers tendered only two out of three bills of lading, offering an indemnity or an undertaking to produce the third, the bank were held to be entitled to reject the tender.

Tender rejected may be withdrawn within contract time.

A tender not in accordance with the contract and rejected by the buyer may be withdrawn by the seller, and the seller may afterwards, within the contract time, make another tender according to the contract which the buyer will be bound to accept. In *Borrowman* v. *Free* (*u*) sellers tendered a cargo of maize which was rejected by the buyers as not being in accordance with the contract. Later, but within the contract time, the sellers tendered another cargo which was in accordance with the contract, and it was held that the second tender was good.

(*t*) (1923), 28 Com. Cas. 253 (C. A.).
(*u*) (1878), 4 Q. B. D. 500 (C. A.).

Payment.

The seller having tendered the proper documents, it becomes the buyer's duty to accept and pay in accordance with the terms of the contract. The delivery contemplated by a c.i.f. contract being a delivery of the documents representing the goods, and not of the goods themselves, possession of the bill of lading placing the goods at the disposal of the buyer, the buyer is not entitled to postpone payment until the goods have arrived or he has had an opportunity of examining them to ascertain whether they are in accord with the contract. This was finally settled in the leading case of *Biddell Bros.* v. *E. Clemens Horst Co.* (*x*), when the effect of sects. 28 and 34 of the Sale of Goods Act, 1893, upon c.i.f. contracts was considered. Those sections are as follows:—

"28. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller must be ready and willing to pay the price in exchange for possession of the goods."

"34.—(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

"(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

The buyers under a contract for the sale of hops "c.i.f. to London, Liverpool or Hull. Terms net cash" declined to pay for the hops except against delivery and

(*x*) (1911) 1 K. B. 220; C. A., *ibid.* 934; (1912) A. C. 18. In *Elliott & Co.* v. *Candor Manufacturing Co.* (1920), III. Lloyd's List L. R. 105, evidence was given and rejected as inconsistent with a c.i.f. contract, of a custom at Tunis that the buyer should have a reasonable time after arrival of the vessel for taking up the documents.

examination of the bales. Hamilton, J. (whose judgment is quoted *supra*, p. 12) held that under a c.i.f. contract the buyer is bound to pay in exchange for the documents even where there is no express term in the contract that payment is to be made "against documents," that either a c.i.f. is an agreement "otherwise" within sect. 28 or possession must be deemed to be given when the goods are put on board and the documents are tendered. The Court of Appeal (Vaughan Williams and Farwell, L.JJ., Kennedy, L.J., dissenting) held that the rule of the law, now embodied in sect. 34 (1), is that the buyer is entitled to inspect before payment and that the right cannot be taken away except by express or implied terms of the contract, which, in their view, did not exist in that case. Kennedy, L.J., whose dissenting judgment (of which material parts are set out *supra*, p. 15) was adopted in the House of Lords, was of opinion that "net cash" is equivalent to "net cash against documents." Tender of goods afloat, he said, is made by tender of the shipping documents, and the bill of lading, being a symbol of the goods, gives the buyer constructive possession. The seller is bound to tender the documents within a reasonable time and there is a corresponding obligation on the buyer to pay against tender. If the buyer were not bound to pay against tender, the seller must either hand the documents to the buyer without payment, which is unreasonable, or retain them, and land and warehouse the goods himself and by so doing incur charges beyond those which alone he has agreed by the contract to pay, viz., the freight and premium of insurance. Moreover, if the buyers' contention were right, and the goods were lost in transit, the buyers need not pay. What then is the necessity of insurance? The buyers' contention involved the proposition that the sellers were bound to deliver the goods themselves in this country, which would be inconsistent with a c.i.f. contract.

With regard to sects. 28 and 34, he was of opinion that sect. 28 is satisfied by the readiness and willingness of the seller to give possession of the bill of lading, that a c.i.f. contract constitutes an agreement otherwise than sect. 34 (2); and as to sect. 34 (1) he said that it was not suggested that the buyer by paying becomes precluded from rejecting the goods if, after their arrival, they are found not to be in accordance with the contract.

In the earlier case of *Polenghi* v. *Dried Milk Co., Ltd.* (*y*), where milk powder was sold by sample c.i.f. London, payment to be made "in cash in London on *arrival* of powders against shipping or railway documents," Kennedy, J., had likewise held that the buyer was not entitled to insist on having an opportunity of comparing the bulk with the sample under sect. 15 (2) (b) of the Sale of Goods Act, 1893 (*z*), before paying the price. He said (*a*) that under the terms of the contract "the sellers (1) must show that the goods are arrived goods and (2) produce the shipping documents. Payment on delivery is excluded by the express stipulation which provides for payment on arrival. The plain meaning of the contract is that, on those two conditions being fulfilled, payment is to be made. If the goods do not answer the description, the buyer has a right to reject, which right is not impaired by the express condition in the contract that 'payment is to be made . . . in London on the arrival of the powders against shipping or railway documents.'"

Buyer must pay if he accepts bill of lading.

If the buyer accepts the bill of lading he must pay the price. By sect. 19 (3) of the Sale of Goods Act, 1893, it is enacted that: "Where the seller of goods draws on the buyer for the price, and transmits the bill of ex-

(*y*) (1904), 10 Com. Cas. 42.

(*z*) The sub-section provides that in the case of a contract of sale by sample, there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample.

(*a*) 10 Com. Cas. 42, at p. 47.

change and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him." "I hold it to be perfectly clear," said Lord Cairns in the House of Lords in *Shepherd* v. *Harrison* (*b*), the decision in which case is the foundation of the section, "that when a cargo comes in this way, protected by a bill of lading and a bill of exchange, it is the duty of those to whom the bill of lading and the bill of exchange are transmitted in a letter, either 'to approbate or to reprobate' entirely and completely, then and there. If they accept the cargo and the bill of lading, and accept the bill of exchange drawn against the cargo, the object of those who shipped the goods is obtained. They have got the bill of exchange in return for the cargo; they discount or use it as they think proper; and they are virtually paid for the goods. But if, on the other hand, the persons to whom the bill of lading is sent do not refuse *in toto* the consignment of the goods, but keep the bill of lading, but do not accept the bill of exchange, then the agents of the foreign shipper have neither the goods nor the money to deal with; if they had repudiated the transaction *in toto* the agents of the shippers might have dealt with some other house and raised money on the goods."

"A person who takes shipping documents which are offered to him upon the conditions of his fulfilling . . . a contractual obligation—namely, to pay for them by accepting a bill drawn upon him . . . cannot keep the goods with one hand and also refuse the terms upon which they are put in his possession with the other" (*c*).

(*b*) (1871), L. R. 5 H. L. 116, at pp. 132, 133.

(*c*) *Per* Kennedy, J., *Barton, Thompson & Co.* v. *Vigers Bros.* (1906), Rep. 19 Com. Cas. 175, at p. 177.

"The buyer of goods on a c.i.f. contract must accept the draft against shipping documents and then make a claim for damages for breach of contract; if he is going to reject the goods he ought not to take the shipping documents" (*d*).

But by sect. 25 (2) of the Sale of Goods Act, 1893 (*e*), "Where a person, having bought or agreed to buy goods, obtains, *with the consent of the seller* (*f*), possession of the goods or the documents of title to the goods (*g*), the delivery or transfer by that person, or by a mercantile agent (*h*) acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith (*i*) and

(*d*) *Per* Pickford, J., *Jordesen & Co.* v. *London Hardwood Co.* (1913), 19 Com. Cas. 161, at p. 164.

(*e*) Cf. sect. 9 of the Factors Act, 1889, which is practically identical with this section.

(*f*) "Consent of the seller" means that which the law regards as consent. It includes the case where possession has been obtained under a contract defeasible on the grounds of fraud; but it excludes the case where possession has been obtained in circumstances amounting to larceny by a trick. See *Cahn & Mayer* v. *Pockett's Bristol Channel Steam Packet Co., Ltd.*, (1898) 2 Q. B. 61; C. A., (1899) 1 Q. B. 643; *Oppenheimer* v. *Frazer & Wyatt*, (1907) 1 K. B. 519; 2 K. B. 50 (C. A.); *Whitehorn Bros.* v. *Davison*, (1911) 1 K. B. 463 (C. A.); *Folkes* v. *King*, (1923) 1 K. B. 282 (C. A.).

(*g*) "Document of title" includes "any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented." Sale of Goods Act, 1893, s. 62 (1); Factors Act, 1889, s. 1 (4).

(*h*) "Mercantile agent" means "a mercantile agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." Sale of Goods Act, 1893, s. 25 (3); Factors Act, 1889, s. 1 (1).

(*i*) "A thing is deemed to be done 'in good faith' within the meaning of this Act when it is in fact done honestly, whether it is done negligently or not." Sect. 62 (2).

without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent (*j*) in possession of the goods or documents of title with the consent of the owner (*k*)." The effect of this provision, in relation to the matter under consideration, is that if the buyer having obtained in ordinary course the bill of lading and a draft for his acceptance disposes of the bill of lading, without accepting the draft, to a third party who takes it in good faith and without notice, the third party obtains a good title and the right of the unpaid original seller to resume possession and control is gone. If possession of the bill of lading has been obtained in circumstances amounting to larceny by a trick, it is otherwise. Thus, in *Cahn & Mayer* v. *Pockett's Bristol Channel Steam Packet Co., Ltd.* (*l*), where the buyer took and parted with the bill of lading but did not accept the bill of exchange it was held that the seller's right of stoppage *in transitu* (*m*) was defeated. The facts of that case were as follows:— Steinman & Co., of Liverpool, on July 10th, 1897, sold certain copper to Pintscher, a merchant of Altona, to be delivered c.i.f. at Rotterdam, payment to be "30 days acceptance from date of bill of lading." The copper was shipped and the sellers forwarded to Pintscher the bill of lading and a bill of exchange for his acceptance. In the meantime Pintscher resold the copper to Cahn & Mayer. When the documents arrived Pintscher was in-

(*j*) See note (*h*), previous page.

(*k*) See the Factors Act, 1889, s. 2.

(*l*) (1898) 2 Q. B. 61; C. A., (1899) 1 Q. B. 643.

(*m*) By sect. 39 (1) of the Sale of Goods Act, 1893, "Notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law . . . , in case of the insolvency of the buyer, a right of stopping the goods *in transitu* after he has parted with the possession of them." And see *infra*, p. 166.

solvent, and he thereupon handed the bill of lading to his bankers for delivery to Cahn & Mayer in pursuance of his contract of re-sale and against payment of the price, which was to be placed to the credit of his account, which was then overdrawn, at his bankers, and this was done, Cahn & Mayer acting in good faith and without notice of the rights of Steinman & Co. Pintscher never accepted the draft. Before the copper arrived at Rotterdam, Steinman & Co. having learnt that Pintscher was insolvent, gave notice to stop *in transitu*, which they were able to do upon giving the shipowners an indemnity. Cahn & Mayer, as endorsees of the bill of lading, then sued the shipowners for damages for non-delivery of the copper. Mathew, J., gave judgment for the defendants on the grounds, (1) that as Pintscher, not having accepted the bill of exchange, was bound to return the bill of lading, the property in the goods did not pass to him by virtue of sect. 19 (3) of the Act (*supra*), and he could transfer no title to Cahn & Mayer; (2) that as Pintscher did not accept the bill of exchange he was never in possession of the bill of lading "with the consent of the seller" within the meaning of sect. 25 (2) of the Act (*supra*).

The Court of Appeal (A. L. Smith, Collins and Romer, L.JJ.) reversed this decision. They held that sect. 19 (3) of the Act was not a relevant provision because it is addressed not to the original obtaining of possession, but to the duty of the recipient after he has got it, which assumes custody with assent; that Pintscher obtained possession of the bill of lading with the consent of the sellers within the meaning of sect. 25 of the Act; that it was immaterial whether the consent was afterwards withdrawn; that having once got possession by consent, Pintscher's subsequent disposition of the bill of lading was effectual notwithstanding that the consent no longer subsisted; and that the right to stop *in transitu* had therefore gone.

In the course of his judgment Collins, L.J., said (*n*): "The Factors Act, 1889, which is thus referred to, and as to part of it in terms again enacted, in the Sale of Goods Act, is the last of a series of statutes whereby the legislature has gradually enlarged the powers of persons in the actual possession of goods or documents of title, but without property therein, to pass the property in the goods to *bonâ fide* purchasers. Possession of, not property in, the thing disposed of is the cardinal fact. From the point of view of the *bonâ fide* purchaser the ostensible authority based on the fact of possession is the same whether there is property in the thing, or authority to deal with it in the person in possession at the time of the disposition or not. But the legislature has not carried the rights of a purchaser under these Acts so far as to make the sale equivalent to a sale in market overt. The purchaser must accept the risk of his vendor having found or stolen the goods, or documents, or otherwise got possession of them without the consent of the owner. But if a mercantile agent, or one of the persons whose disposition is made as effectual as that of a mercantile agent, has obtained possession by consent of the owner, even though it were under a contract voidable as fraudulent (see *Baines* v. *Swainson* (*o*); *Sheppard* v. *Union Bank of London* (*p*)), he is able to pass a good title to a

(*n*) (1899) 1 Q. B. at p. 658. And see *per cur. Oppenheimer* v. *Frazer & Wyatt,* (1907) 2 K. B. 50 (C. A.).

(*o*) (1863), 32 L. J. Q. B. 281. Plaintiffs, cloth manufacturers, were informed by one Emsley, a commission agent, that he could get them a customer for some of their goods, giving the name of Sykes as that of the intended purchaser. Plaintiffs, believing the representations, sent parcels of goods from time to time to Emsley's warehouse, where he was to see them "perched," and was then to transmit them to Sykes. The statements made by Emsley with reference to Sykes were untrue, and he sold the goods to defendants, who purchased them *bonâ fide*. Held, that Emsley was an agent intrusted with the goods within the meaning of the Factors Acts, and therefore the purchase by defendants was protected.

(*p*) (1862), 31 L. J. Ex. 154 (fraudulent pledge of jewellery to bank by agent to secure advances to third person held protected).

bonâ fide purchaser. However fraudulent the person in actual custody may have been in obtaining the possession, provided it did not amount to larceny by a trick, and however grossly he may abuse confidence reposed in him, or violate the mandate under which he got possession, he can by his disposition give a good title to the purchaser. See the distinction between possession obtained by a trick and possession under a contract voidable for fraud noted by Blackburn, J., in *Cole* v. *North Western Bank* (*q*). These considerations seem to me decisive of the crucial question in this case. By sending the bill of lading and the bill of exchange direct to Pintscher, Steinman & Co. constituted him bailee of both of them. It seems impossible to say that there was any wrongful taking by Pintscher. There was no trick which would have negatived a bailment. If he became criminally responsible for his consequent dealing with the bill of lading, it must have been as bailee, which presupposes a taking by consent. The circumstances of the obtaining possession would not have supported an indictment for larceny, and the subsequent abuse of his opportunity could not alter the character of the original taking. He might conceivably have fully intended to accept the draft and forward it by the first post. If he had disposed of the bill of lading, while he remained in this attitude of mind, and subsequently accepted the draft, and forwarded it, and become insolvent before the *transitus* of the goods was over, could Steinman & Co. have stopped effectually on the ground that Pintscher had not obtained possession of the bill of lading with their consent? If not, it could only be because the original taking was with their consent. The possession, *i.e.*, the actual custody, was ob-

(*q*) (1875), L. R. 10 C. P. 354, at p. 373. "It has been repeatedly held that, where either the goods or documents of title are obtained from the owner (not on a contract of sale good till defeated, though defeasible on account of fraud, but by some trick), a purchaser or pledgee acquires no title, for the trickster is not 'an agent intrusted' with the possession."

tained once for all when the bill of lading was placed in Pintscher's hand, and no subsequent changes in his intention with regard to the draft could change the character of this contemplated act. It would, in my opinion, defeat the purpose of the Act, and work a public mischief, if a vendor who had himself placed the bill of lading in the hands of his purchaser were entitled as against a *bonâ fide* sub-purchaser from the latter to enter into nice questions as to the intention with which the original purchaser took the document of title into his possession."

The misfortune of Steinman & Co. in that case would have been avoided if they had adopted the safer practice of sending the bill of lading to their own agents instead of sending it to Pintscher direct.

Time within which buyer has to pay.

The buyer must be prepared to pay or accept the draft, as the case may be, according to the terms of the contract of sale within a reasonable time after the shipping documents are tendered to him. What is a reasonable time is a question of fact depending on the circumstances. In ordinary cases it is conceived that payment or acceptance must come promptly after tender. Business could hardly be conducted otherwise. The ship may be arriving or have arrived, and landing and other charges may be accruing when the documents are tendered. It is a matter of importance for the seller that he should know one way or the other without delay whether the buyer is going to take up the documents. The case of *Ryan* v. *Ridley & Co.* (*r*) is an authority for the proposition that where the sale is of perishable articles the buyer must be practically ready with his money. In that case the sale was of a cargo of Newfoundland codfish per "Margaret" "sailed on October 9 to Lisbon for orders to be delivered at Bari," c.i.f. "payment to be made by cash in London in exchange for bill of lading and policy of insurance."

(*r*) (1902), 8 Com. Cas. 105.

The "Margaret" arrived at Lisbon on October 24 and shortly afterwards the seller tendered the shipping documents and requested payment in exchange. Payment not having been made by the buyers on November 1, the seller sold the cargo a day or two later and then sued the buyers for the loss on that sale. Kennedy, J., held that they were entitled to resell and recover their loss. He held that "cash against documents" meant that when the documents were tendered the cash must, in a practical and business sense, be ready. It did not mean that "if the seller walks into the buyer's office and offers the documents, the buyer will have committed a breach of contract because he does not at once tender money or a cheque in payment. That would not be business. The clause means that the payment against the documents must be made within a reasonable time from their presentation; *e.g.*, if the buyer says: 'You shall have a cheque to-morrow morning,' that would, I think, ordinarily be sufficient. Or even a greater delay might not be unreasonable if it would not affect the interests of the parties. If ever there was a case in which the nature of the cargo demanded promptitude, that of the cargo in the present case did" (*s*).

Payment of duties.

Subject to the terms of the contract, payment of import duties on goods imported under a c.i.f. contract forms no part of the seller's obligation, and if the seller should have to pay them, because tender is made after arrival of the goods, he can recover the amount from the buyer. Conversely, export duties, in the absence of agreement to the contrary, are payable by the seller under a c.i.f. contract, since they are an expense necessarily incurred before he can fulfil his obligation to ship the goods. In the case of *American Commerce Co., Ltd.* v. *Frederick Boehm, Ltd.* (*t*) the sale was of saccharine to be shipped from New York to a British port at the price

(*s*) (1902), 8 Com. Cas. at p. 107. (*t*) (1919), 35 T. L. R. 224.

of 220*s*. per lb. c.i.f. "duty paid." Between the date of the contract and tender the import duty on saccharine imported into Great Britain was increased, and the sellers were obliged to pay the increased duty. They sought to recover the amount of the increase from the buyers. Bray, J., held that the words "duty paid" did not constitute an agreement that the sellers should pay the amount of the increase after the date of the contract and was therefore not "an agreement to the contrary" within sect. 10 (1) of the Finance Act, 1901 (*u*), and the sellers were entitled to recover the amount.

Payment may be postponed though the property passes.

Though the property in the goods sold passes to the buyer, payment may, by the terms of the contract, be postponed. "They (the parties) may bargain that the property shall vest in the purchaser as owner as soon as the goods are shipped; that they shall then be both sold and delivered; and yet that the price (in whole or in part) shall be payable only on the contingency of the goods arriving" (*x*).

Thus, in *Dupont* v. *British S. Africa Co.* (*y*), the action was to recover the price of two shipments of bullocks or damages for non-acceptance. There were two contracts for the sale of bullocks to be shipped at Buenos Ayres c.i.f. Beira. Each contract stipulated that one half of the price was to be paid, and it was paid, at Buenos Ayres on shipment against bills of lading made

(*u*) 1 Edw. 7, c. 7. "Where any new Customs import duty or new Excise duty is imposed, or where any Customs import duty or Excise duty is increased, and any goods in respect of which the duty is payable are delivered after the day on which the new or increased duty takes effect in pursuance of a contract made before that day, the seller of goods may, *in the absence of agreement to the contrary*, recover as an addition to the contract price a sum equal to any amount paid by him in respect of the goods on account of the new duty or the increase of duty, as the case may be."

(*x*) *Per* Blackburn, J., *Calcutta & Burmah Steam Navigation Co.* v. *De Mattos* (1863), 32 L. J. Q. B. 322, at p. 328; 33 *ibid.* 214, where the decision was to this effect.

(*y*) (1901), 18 T. L. R. 24.

out to the order of the buyers which with the policy of insurance were handed over to the buyers in London. The unpaid half of the price was payable in Capetown on delivery of the shipments at Beira. Kennedy, J., held that the proper legal inference from the facts was that the property in each of the shipments was intended to pass and did pass to the buyers upon completion of the shipments. He also held that payment of the unpaid balance of the price was dependent upon delivery at Beira.

The Passing of the Property (*z*).

By sect. 20 of the Sale of Goods Act, 1893, "unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not." In other words, the risk *primâ facie* passes with the property. "As a general rule," said Blackburn, J., in *Martineau* v. *Kitching* (*a*), "*res perit domino,* the old civil law maxim, is the maxim of our law; and when you can show that the property passed, the risk of the loss *primâ facie* is in the person in whom the property is. If, on the other hand, you go beyond that, and show that the risk attached to one person or the other, it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may well be that the property shall be in the one and the risk in the other." Under a c.i.f. contract the buyer is in effect the insurer. The transfer to him of the bill of lading and the policy of insurance giving to him the right of action in respect of loss or damage to the goods on and after shipment has the effect

(*z*) On the general question, see Benjamin on Sale, Bk. II., and particularly Ch. VI., "Reservation of Right of Disposal."

(*a*) (1872), L. R. 7 Q. B. 436, at p. 453; discussed and approved in *The Parchim,* (1918) A. C. 159, at p. 168 (P. C.).

of placing the goods at his risk on and after shipment (*b*), subject to the performance of the seller's obligation to tender the shipping documents required by the contract. But the property in the goods may not, and generally does not, pass on shipment or until tender and payment. It is entirely a question of intention, and no general rule can be laid down as to when property passes under a c.i.f. contract. The intention has to be gathered from the terms of the contract, the conduct of the parties and the circumstances of the case. In the absence of expressed intention in the contract, the Sale of Goods Act, 1893, lays down the following rules for inferring, or, as has been said, for creating an intention:—

Sect. 16.—Where there is a contract for the sale of *unascertained* goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.

Sect. 17.—(1) Where there is a contract for the sale of *specific or ascertained goods* (*c*) the property in them is transferred to the buyer *at such time as the parties to the contract intend it to be transferred.*

(2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case.

Sect. 18.—*Unless a different intention appears,* the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

Rule 1.—Where there is an *unconditional contract* (*d*) for the sale of *specific goods* (*e*), in a deliverable state (*e*), the property in the goods passes to the buyer when the contract

(*b*) *Tregelles* v. *Sewell* (1862), 7 H. & N. 574, *ante,* p. 6; *per* Kennedy, L.J., *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 934, *ante,* p. 15; *C. Groom, Ltd.* v. *Barber,* (1915) 1 K. B. 316, per Atkin, J., *ante,* p. 117.

(*c*) *I.e.*, goods identified and agreed upon at the time a contract of sale is made. Sect. 62.

(*d*) A c.i.f. contract is not an unconditional contract.

(*e*) " Deliverable state " is the state in which the buyer is bound to accept. Sect. 62.

is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

Rule 2.—Where there is a contract for the sale of *specific* goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state (*e*), the property does not pass until such thing be done, and the buyer has notice thereof.

Rule 3.—Where there is a contract for the sale of *specific* goods in a deliverable state (*e*), but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof.

Rule 5.—(1) Where there is a contract for the sale of *unascertained* or future goods (*f*) by description, and goods of that description and in a deliverable state are *unconditionally appropriated* to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and *does not reserve the right of disposal*, he is deemed to have unconditionally appropriated the goods to the contract.

Further, by sect. 19 (1), where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, *by the terms of the contract or appropriation, reserve the right of disposal* of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

(2) Where goods are shipped, and by the bill of lading the goods are deliverable *to the order of the seller or his agent*, the seller is *primâ facie deemed to reserve the right of disposal.*

(*e*) "Deliverable state" is the state in which the buyer is bound to accept. Sect. 62.

(*f*) *I.e.*, goods to be manufactured or acquired by the seller after the making of the contract of sale. Sect. 62.

(3) Where the seller of the goods draws on the buyer for the price and *transmits the bill of exchange and bill of lading to the buyer together*, to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him (*g*).

Applying these provisions to a c.i.f. contract, *primâ facie*, subject to the terms of the contract, the property in *ascertained* or *specific goods* sold does not pass before the goods are shipped, since, though the goods are ascertained and agreed upon at the time of the formation of the contract, shipment is a condition of the contract to be performed by the seller. Whether the property then passes depends upon whether the right of disposal is reserved by the seller (sect. 19), a question which will be more conveniently referred to in relation to the sale of unascertained goods. As regards the latter, that is, the sale of *unascertained goods*—by far the most common subject of a c.i.f. sale—appropriation of goods to the fulfilment of the contract may, but does not necessarily, take place on shipment. It takes place on shipment if the seller then destines the goods to the particular buyer, whether the buyer or his agent is the consignee named in lading or the goods are made deliverable to the order of the seller or his agent. Whether the effect of such appropriation is there and then to vest the property in the goods in the buyer depends in substance upon the form in which the bill of lading is taken. If by the bill of lading delivery is to be to the buyer or his agent, it would appear that the property passes to the buyer immediately on shipment, unless the seller retains the bill of lading as security for the price, in which case the property vests on tender of the price; if by the bill of lading the goods are deliverable to the seller or his agent, the principles stated in the judgments of Bramwell and

(*g*) See *ante*, p. 128.

Cotton, L.JJ., in *Mirabita* v. *Imperial Ottoman Bank* (*h*) and enacted in sect. 19 (1) and (2) of the Act of 1893 (*supra*) apply. In that case Cotton, L.J., with whose judgment Bramwell, L.J., expressly concurred, said (*i*) as follows: "Under a contract of sale of chattels *not specific* the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so, not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves unto himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Wait* v. *Baker* (*k*), *Ellershaw* v. *Magniac* (*l*) and *Gabarron* v.

(*h*) (1878), 3 Ex. D. 164.

(*i*) *Ibid.* at p. 172.

(*k*) (1848), 2 Ex. 1. Sale of barley f.o.b. Kingsbridge, payment in cash on receipt of bill of lading or acceptance at two months. Seller loaded on a ship chartered by him for buyer, but in his own name, and took bills of lading *to his own order*. He left an unendorsed bill of lading with the buyer, who, however, objected to the quality, but offered to take the cargo, and tendered the amount

(*l*) See next page.

Kreeft (*m*) (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept the bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *Trustees of Liverpool Docks* (*n*); *Shepherd* v. *Harrison* (*o*); *Ogg* v. *Shuter* (*p*). But if the bill of lading has been dealt with

in money. Seller refused the money or to endorse the bill of lading, and disposed of it elsewhere. Held, that "there was nothing which amounted to an appropriation in the sense of that term, which alone would pass the property."

(*l*) (1843), 6 Ex. 570. Buyer of linseed sent a ship to load it and paid part of the price. Seller took a bill of lading "*to order or assigns,*" and obtained advances by transferring it to a *third party*. Held, that seller had reserved the right of property.

(*m*) (1875), L. R. 10 Ex. 274. Seller, who had been paid, took a bill of lading (for ore shipped on buyer's chartered ship) *to order of a fictitious person*, endorsed it and pledged it with a third party. Held, that the property did not pass on payment or shipment.

(*n*) (1851), 6 Ex. 543. Sellers of cotton loaded it on buyers' ship, took bills of lading *to their own order*, "he or they paying freight, *nothing, being owner's property,*" sent an invoice to the buyers, drew bills of exchange on the buyers and sold them to a bank to whom they transferred the bills of lading as security, and so informed the buyers. Held, that the *jus disponendi* had been reserved.

(*o*) (1871), L. R. 5 H. L. 116. Bill of lading to *sellers' order* sent with bill of exchange to their agents.

(*p*) (1875), 1 C. P. D. 47 (C. A.). Potatoes sold f.o.b. were shipped in *buyers' own sacks* under bill of lading to *seller's order*, and buyers made part payment. Bill of lading was endorsed by seller to his agent, who presented it with a draft for balance of price to buyers

only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser."

The effect of the judgments in this case, says Scrutton, J. (*q*), is that "where the seller by taking the bills of lading in his own name or to his own order, has reserved the *jus disponendi* or power of dealing with the goods, the property does not pass on shipment, but is vested in the vendor until he receives payment from the buyer in exchange for the documents of title. If the seller has taken the bill of lading in the purchaser's name but retains it as security for the price, the property appears to vest on the buyer's tendering the price."

The facts in *Mirabita* v. *Imperial Ottoman Bank* (*supra*) were as follows: The sellers shipped a cargo of umber on a ship chartered for the buyer and took bills of lading "to order or assigns." They drew upon the buyer for the price and discounted the draft, with the bills of lading attached, with the defendant bank, the bills of lading to be given up to the buyer on his meeting the draft. On arrival of the cargo the buyer refused to accept the draft, but later tendered the amount for which it was drawn and claimed delivery of the bills of lading. The bank refused to accept the amount of the draft and sold the cargo. It was held by the Court of Appeal that

for acceptance. Buyers refused draft, and seller resold potatoes. Held, that the form of the bill of lading was effectual to reserve the right of disposal.

(*q*) *Arnhold Karberg & Co.* v. *Blythe*, (1915) 2 K. B. 379, at p. 387.

the property in the cargo had passed to the buyer so as to entitle him to maintain an action of trover against the bank, the basis of the decision being that the sellers had dealt with the bills of lading only to *secure* payment, intending that the property should pass on acceptance or payment, and not with the intention of withdrawing the goods from the contract, as in *Wait* v. *Baker, Ellershaw* v. *Magniac, Gabarron* v. *Kreeft, supra,* and therefore the bank was bound to give up the bills on tender of the price.

In *Biddell Bros.* v. *E. Clemens Horst Co.*, Kennedy, L.J., said (*r*): "Under the Sale of Goods Act, 1893, s. 18, by such shipment the goods are appropriated by the vendor to the fulfilment of the contract, and by virtue of sect. 32 (*s*) the delivery of the goods to the carrier—whether named by the purchaser or not—for the transmission to the purchaser is *primâ facie* deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c.i.f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or his representative; see the judgments of

(*r*) (1911) 1 K. B. at p. 956; approved, H. L., (1912) A. C. 18. And see *per* Kennedy, J., *Ryan* v. *Ridley* (1902), 8 Com. Cas. 105, at p. 107 (the facts of which are set out *ante*, p. 135), "No property passed to the defendants until the condition named in the clause was performed—namely, until the defendants received the bill of lading and policy of insurance."

(*s*) Set out *ante*, p. 16, n. (*m*).

Bramwell, L.J., and Cotton, L.J., in *Mirabita* v. *Imperial Ottoman Bank* (*supra*). It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative as consignee," unless, according to the interpretation of Scrutton, J., of the judgments in *Mirabita* v. *Imperial Ottoman Bank* (quoted *supra*), the seller retains the bill of lading as security for the price, in which case the property vests on the buyer paying or tendering the price.

In *The Parchim* (*t*), a Prize case, where, having regard to the terms of the contract and the particular circumstances of the case, it was held that the property in the goods passed on shipment, Lord Parker, delivering the judgment of the Privy Council, said, with regard to the passing of property (*u*):—

"The English cases on which the Sale of Goods Act was founded seem to show that the appropriation would not be such as to pass the property if it appears or can be inferred that there was no actual intention to pass it. If the seller takes the bill of lading to his own order and parts with it to a third person, not the buyer, and that third person, by possession of the bill of lading, gets the goods, the buyer is held not to have the property so as to enable him to recover from the third party, notwithstanding that the act of the seller was a clear breach of the contract: *Wait* v. *Baker* (*x*); *Gabarron* v. *Kreeft* (*y*). This seems to be because the seller's conduct is inconsistent with any intention to pass the property to the buyer by means of the contract followed by appropriation. On the other hand, if the seller deals with the bill of lading only to secure the contract price, and not with the intention of withdrawing the goods from the

(*t*) (1918) A. C. 157.
(*u*) *Ibid.* p. 170.
(*x*) (1848), 2 Ex. 1, *ante*, p. 142, n. (*k*).
(*y*) (1875), L. R. 10 Ex. 275, *ante*, p. 143, n. (*m*).

contract, he does nothing inconsistent with an intention to pass the property, and therefore the property may pass either forthwith subject to the seller's lien or conditionally on performance by the buyer of his part of the contract: *Mirabita* v. *Imperial Ottoman Bank* (*z*); *Van Casteel* v. *Booker* (*a*); *Brown* v. *Hare* (*b*); *Joyce* v. *Swann* (*c*). The *primâ facie* presumption in such a case appears to be that the property is to pass only on the performance by the buyer of his part of the contract and not forthwith subject to the seller's lien. Inasmuch, however, as the object to be attained, namely, securing the contract price, may be attained by the seller merely reserving a lien, the inference that the property is to pass on the performance of a condition only is necessarily somewhat weak, and may be rebutted by the other circumstances of the case," as occurred in *Joyce* v. *Swann* (*c*).

(*z*) (1878), 3 Ex. D. 164, *ante*, p. 142.

(*a*) (1848), 2 Ex. 691. Sellers shipped goods on a vessel sent by buyers, and took a bill of lading " to order or assigns " and showing that they were " freight free," sent the bill of lading endorsed in blank to buyers with an invoice stating the goods to have been shipped " on account and risk " of buyers. Jury found that the goods were put on board for and on account of and at risk of buyers, and the Court refused to set aside a general verdict for the buyers.

(*b*) (1858), 27 L. J. Ex. 372; 29 L. J. Ex. 6. Sale of rape oil f.o.b. Rotterdam, payments by bill of exchange to be accepted on delivery of bills of lading. Sellers sent to their broker, through whom the purchase was made, bill of lading " to order or assigns " endorsed by sellers to order of buyers, with invoice specifying casks with marks and numbers. The broker sent the documents to the buyers. The ship was then lost, and the broker knew it. Buyers, on learning of the loss two hours after receiving the bill of lading, returned it to the broker. Held, that the property had passed.

(*c*) (1864), 17 C. B. (N. S.) 84. There the property was held to have passed when the goods were put on board, though the sellers took the bill of lading to their own order; in so doing they were acting as the buyer's agents and not for the purpose of retaining control of the goods. The inference from the form of the bill of lading was rebutted.

Lord Sumner in *The Prinz Adalbert* (*d*), also a Prize case, stated the general law in the common case where the seller discounts the bill of exchange drawn upon the buyer with a banker and delivers to him the bill of lading as security in the following terms:—

"The delivery of an indorsed bill of lading, made out to the shipper's order while the goods are afloat, is equivalent to delivery of the goods themselves, and is effectual to transfer ownership if made with that intention. The bill of lading is the symbol of the goods. Apart from specific formalities or similar prescriptions of municipal law, which are not now material, such intention is a question of fact. The usual course of dealing in the export of merchandise and the interest of the parties concerned in it suffice for the necessary inference in the absence of evidence to the contrary. When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading, indorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment. If, in turn, the discounting banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party's liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship's arrival. If the shipper, being the owner of the goods, authorises and directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when

(*d*) (1917) A. C. 586 (P. C.).

this is done, but intends also to remain the owner until this has been done. Particular arrangements made between shipper and consignee may modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arise only out of a state of war existing or imminent at the beginning of the transaction, the general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted."

In that case American sellers shipped lubricating oil in a German steamer and consigned it to a Hamburg firm, two bills of lading being taken to the sellers' order at Hamburg. The bills were indorsed in blank and attached to two drafts drawn by the sellers on the Hamburg firm and discounted with an American bank which forwarded the documents to Germany. One draft was accepted by the Hamburg firm on the 1st August, 1914, the other was stated to have been accepted on the 10th August. In the meantime the European War broke out and on the 5th August the steamer was captured by the British. The sellers, on the 18th August, claimed the oil in the Prize Court as their property. It was held by the Privy Council that it was the sellers' intention that the property should pass on acceptance of the drafts, that therefore the property in the first consignment passed to the German firm on the 1st August. As regards the second consignment the sellers were held not to have proved that they were the owners on the 18th August.

On the same principles, in the earlier case of *The Miramichi* (*e*), where the buyers refused to accept the bill of exchange or take up the documents, the property was held not to have passed. There by a contract made in June, 1914, American merchants sold wheat c.i.f. to a German firm of Colmar, payment by "check against

(*e*) (1915) P. 71.

documents." The sellers bought the wheat for implementing the contract from one Fox who shipped it at Galveston in July, 1914, taking the bill of lading to the order of one Davis or his or their assigns. It was indorsed generally, and the sellers, having paid Fox, obtained it but did not indorse it in favour of the buyers. They drew a bill of exchange on the buyers and discounted it with bankers, depositing with the latter the bill of lading and insurance certificates to be delivered to the buyers against payment of the bill, and on the same day they sent an invoice to the buyers with full particulars of the shipment, draft and documents. The buyers refused to accept the documents. It was held by Sir S. Evans, P., in the Prize Court that the sellers had reserved the right of disposal, and the wheat belonged to the sellers and the bankers. "In my opinion," said the President (at p. 78), "the result of the many decisions from *Wait* v. *Baker* up to *Ogg* v. *Shuter, Mirabita* v. *Ottoman Bank,* and thence up to the Sale of Goods Act, 1893; and of the provisions of the Sale of Goods Act itself, following closely on these matters the judgments of Cotton, L.J., in *Mirabita* v. *Ottoman Bank;* and of the decisions subsequent to the Act, *e.g., Dupont* v. *British South Africa Co., Ryan* v. *Ridley* and *Biddell* v. *E. Clemens Horst,* is that, in the circumstances of the present case, the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid."

The case of *Stein, Forbes & Co.* v. *County Tailoring Co.* (*f*) affords, perhaps, a useful example of the applica-

(*f*) (1917), 86 L. J. K. B. 448.

tion of the principles stated to an ordinary c.i.f. contract. There buyers of sheepskins c.i.f. Liverpool, "payment net cash against documents on arrival of the steamer," refused to take up the documents. The sellers sued, not for damages, but for the price, which they could only recover if the property had passed to the buyers. They contended unsuccessfully that the property passed to the buyers on shipment or on tender of the documents and they were entitled to the price. Atkin, J., said: "At what time property passes under a contract of sale depends upon the intention of the parties. . . . The Act provides certain rules for ascertaining the intention of the parties unless a different intention appears. . . . Counsel for the plaintiffs contends that, as soon as the goods are unconditionally appropriated to the contract and the seller holds the documents at the disposal of the buyer, the property passes. The value of that proposition depends on the meaning of 'unconditionally.' I doubt whether goods are appropriated unconditionally if the seller does not mean the buyer to have them unless he pays for them. But it seems to me impossible to lay down a general rule applicable to all c.i.f. contracts. The overruling question is 'Does the intention of parties appear in the course of the making and the fulfilment of the contract?' . . . In the present case the goods were shipped at New York, on behalf of the plaintiffs, and the bill of lading was taken to the order of the banking firm which financed the transaction for the plaintiffs. On arrival of the ship the plaintiffs had to take up the bill of lading from the bankers, and, as the defendants would not take up the documents the plaintiffs had to take delivery of the goods from the ship. It seems quite plain that the seller or his banker reserved the *jus disponendi*. It was said that the property passed to the buyer on shipment, and the seller only received his unpaid seller's lien. That view seems to me inconsistent with sect. 19 of the Sale

of Goods Act, 1893 (*g*), and with every business probability.

"Then it is said that, whatever the original intention may be, at any rate the property passes when there is appropriation of specific goods, as by the invoices in this case and a tender or willingness to tender. It would be a remarkable intention in a commercial man to keep the property on shipment in order to secure payment, but yet in taking the necessary steps to procure payment by appropriation and tender to part with the property before payment is in fact made. I think that in such cases the ordinary inference to be drawn is that the seller does not intend to part with property except against payment. It seems to me that this view is confirmed by the provision of sect. 19, sub-sect. (3) of the Act" (*g*).

The authoritative statements which have been quoted of the principles upon which the Court acts in determining the question as to when property passes in a sale of goods to be shipped, amplifying the terms of the Sale of Goods Act, afford a working guide for determination of the question in relation to c.i.f. contracts. No good purpose, it is thought, would be served by the citation of decisions on particular contracts and facts which rarely present substantial similarity (*h*). The recital of decisions on different sets of facts tends rather to obscure than to elucidate the principles. Moreover, as Atkin, J., has pointed out in *C. Groom, Ltd.* v. *Barber* (*i*), it is generally immaterial in whom the property in goods sold c.i.f. was before tender, whether it was in the seller or in the buyer or in a third party,

(*g*) Set out *ante*, p. 140.

(*h*) Certain cases, (i) where the property and possession in goods shipped has been held on the facts to be transferred to the vendee, (ii) where the property or possession was held to have been reserved by the vendor and shipper, are enumerated in Scrutton on Charter-parties, 12th ed., p. 197, n. (*q*).

(*i*) (1915) 1 K. B. 316, *ante*, p. 117.

since the seller's obligation is to deliver the documents to the buyer within a reasonable time after shipment and possession of the documents gives the buyer the right to obtain delivery of the goods, and in the case of loss or damage or misdelivery to recover therefor, in a proper case, under the policy of insurance or the contract of carriage. The seller "need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender. If it were otherwise the shipper of goods in bulk, or of goods intended for several contracts, or the intermediate seller who may be the last of a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms" (*k*).

(*k*) *Ibid.* at p. 324.

CHAPTER V.

OF REMEDIES (*a*).

1. *Breach of Contract by the Seller.*

Failure to ship or to tender documents.

In the event of breach of contract by the seller in failing or refusing to ship the goods and/or to tender the documents the buyer has his remedy in an action for damages (*b*). The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract (*c*). Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price (*d*) of similar c.i.f. goods at the time or times when the documents (which represent the goods) would have been tendered to the buyer, if the seller had shipped at the agreed time and sent the docu-

(*a*) It would, of course, be outside the scope of this book to attempt to deal fully with the subject of legal remedies for breaches of contracts of sale, in regard to which the reader is referred to the well-known text-books on the Sale of Goods and Damages. It is intended in this chapter to make some reference, in more or less summary form, to the remedies available to buyer and seller, but in the main to direct attention to certain kinds of questions which commonly present themselves in regard to c.i.f. contracts.

(*b*) Sale of Goods Act, 1893, s. 51 (1).

(*c*) *Ibid.* s. 51 (2).

(*d*) As to market price, see *per* James, L.J., *Dunkirk Colliery Co.* v. *Lever* (1878), 9 C. D. 20, at p. 25 (C. A.); *Wertheim* v. *Chicoutimi Pulp Co.*, (1911) A. C. 301, at p. 316 (P. C.); *Weiss & Co.* v. *Sagarmull* (1923), XV. Lloyd's List L. R. 134 (no market price: price in contract of resale taken into account).

ments to the buyer with all reasonable diligence (*e*) after shipment. The date when the goods would have reached the contractual destination is not the criterion. This was so held by Atkin, J., in *C. Sharpe & Co.* v. *Nosawa & Co.* (*f*), in reference to sect. 51 (3) of the Sale of Goods Act, 1893 (*g*); and, though McCardie, J., in a later case (*h*) seems, perhaps, to have entertained some doubt as to the correctness of the decision, it is submitted that it is only the logical application to sect. 51 (3) of the accepted principle that the delivery intended by a c.i.f. contract is constructive delivery by tender of the shipping documents.

The facts of the case of *C. Sharpe & Co.* v. *Nosawa & Co.* (*f*) illustrate the application of the principle in the ordinary case. Japanese peas were sold c.i.f. London to be shipped in June. They were not shipped. Shipping documents relating to the last possible shipment in June would, in the proper course, have reached London on July 21st. The goods, if shipped, would have arrived on August 30th. If the buyers, who were claiming damages for non-delivery, could have gone into the market on or shortly after July 21st and bought Japanese beans June shipment, the difference of price would have been the measure of damages. But as on the facts it was found that the buyers could not have purchased similar goods coming forward on a June shipment but could have, and acting reasonably would have, bought them on the spot,

(*e*) See *ante*, p. 107.

(*f*) (1917) 2 K. B. 814.

(*g*) "Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods *at the time or times when they ought to have been delivered* or, if no time was fixed, then at the time of the refusal to deliver."

(*h*) *Produce Brokers Co.* v. *Weis & Co.* (1918), 87 L. J. Q. B. 472, where, having regard to the special terms of the contract, McCardie, J., assessed the damages as at the date when a provisional invoice should have been given to the buyers.

Breach of other terms, whether or not conditions.

If the seller ships the goods and tenders the documents to the buyer but has not complied with all the terms, express or implied, of the contract the question will arise whether such non-compliance is a breach giving rise to the right to reject the documents and to treat the contract as repudiated, or is a breach for which the remedy lies in an action for damages only. The question depends upon the intention of the parties to be inferred from the contract and the circumstances legally admissible in evidence with reference to which the contract is to be construed (*n*). "There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look at is to what extent the accuracy of the statement—the truth of what it promises—would be likely to affect the substance and foundation of the adventure; not the effect of the breach which has in fact taken place, but the effect likely to be produced on the foundation of the adventure by any such breach of that portion of the contract" (*o*).

documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same."

(*n*) *Per* Parke, B., *Graves* v. *Legg* (1854), 9 Ex. 709, at p. 716; cited by Blackburn, J., *Bettini* v. *Gye* (1876), 1 Q. B. D. 183, at p. 186. For a discussion of the general principles relating to conditions and warranties, see Benjamin on Sale, Bk. IV., Pt. I., Ch. I.

(*o*) *Per* Bowen, L.J., *Bentsen* v. *Taylor, Sons & Co.*, (1893) 2 Q. B. 274, at p. 281.

Accordingly, the Sale of Goods Act, 1893. s. 11 (1) (b), provides that:—"Whether a stipulation in a contract of sale is a condition the breach of which may give rise to a right to treat the contract as repudiated, or a warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract."

Illustrations have been given in Chapter II. of stipulations in c.i.f. contracts which have been held to be conditions in the above sense, that is to say, entitling the buyer on breach to reject.

Apart from express stipulations there are, or may be, in the particular circumstances prescribed by the Sale of Goods Act, implied conditions that the seller has or will have a right to sell the goods (sect. 12), that the goods shall correspond with the description (sect. 13), that they shall be reasonably fit for the purpose for which they are required (sect. 14 (1)), and of merchantable quality (sect. 14 (2)), and, in the case of a contract for sale by sample that the bulk shall correspond with the sample in quality, that the buyer shall have a reasonable opportunity of comparing the bulk with the sample, and that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (sect. 15).

Waiver of conditions.

But the buyer may not be able to take advantage of the breach of a condition to be performed by the seller. In the first place he may have waived it (*p*). A party may waive a stipulation which is for his benefit (*q*); and

(*p*) *E.g.*, where buyers retained documents which they knew they were entitled to reject, from September 22nd to October 3rd. *Shipton, Anderson & Co.* v. *Weston & Co.* (1922), X. Lloyd's List L. R. 762.

(*q*) *Bentsen* v. *Taylor*, (1893) 2 Q. B. 274 (C. A.).

by sect. 11 (1) (a) of the Act it is enacted that: "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated."

Secondly, sect. 11 (1) (c) of the Act provides that:—

"Where a contract of sale is not severable (*r*) and the buyer has accepted the goods, or part thereof, or where the contract is for specific goods, the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty, and not as a ground for rejecting the goods and treating the contract as repudiated, unless there be a term of the contract, express or implied, to that effect."

Thirdly, performance of a condition may be excused by reason of impossibility in law or in fact (*s*).

Fourthly, the buyer may, by his own acts, excuse the seller from fulfilling the condition by (i) preventing its performance (*t*), (ii) rendering himself unable to perform

(*r*) An illustration of a severable contract is one for delivery of goods by instalments where the price is payable separately. See, as to this, *post*, p. 175.

(*s*) Sect. 11 (3) of the Sale of Goods Act, 1893, provides that: "Nothing in this section shall affect the case of any condition or warranty, fulfilment of which is excused by law by reason of impossibility or otherwise." Two cases of impossibility are dealt with in sects. 6, 7 of the Act, viz.: Sect. 6, "Where there is a contract for sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract was made, the contract is void"; and sect. 7, "Where there is an agreement to sell specific goods, and subsequently the goods, without any fault of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided." The words "or otherwise" in sect. 11 (3) are sufficient to cover the fourth ground stated in the text.

(*t*) If performance of a condition precedent has been made impossible by the neglect or default of the other party, "it is equal to performance." *Per* Ashurst, J., *Hotham* v. *E. India Co.* (1787), 1 T. R. 645. *E.g.*, *Mackay* v. *Dick* (1881), 6 A. C. 251; dist. in *Colley* v. *Overseas Exporters*, (1921) 3 K. B. 302.

his own part, or (iii) refusing to perform his own part (*u*).

If for any reason the buyer is not entitled to reject the documents and treat the contract as repudiated, his remedy lies in damages for breach. (Sect. 53 of the Act.)

If the goods on arrival are found not to be in accordance with the contract, the buyer who has paid against the documents may reject the goods (*v*) and recover the price and damages (*x*).

Time and place of rejection.

The buyer must exercise his right of rejection in good time; otherwise he may be held to have accepted the goods, in which case his remedy lies in damages only. The relevant sections of the Sale of Goods Act, 1893, are sects. 34 and 35. By sect. 34 it is provided that (1) where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. (2) Unless otherwise agreed, when the seller tenders delivery of the goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract (*y*). By sect. 35 it is provided that the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is

(*u*) *E.g.*, *Braithwaite* v. *Foreign Hardwood Co.*, and other cases cited *infra*, p. 168, n. (*n*).

(*v*) See *ante*, pp. 14, 21, 126, 128.

(*x*) See *Heilbutt* v. *Hickson* (1872), L. R. 7 C. P. 438. For example, as in *Molling* v. *Dean*, cited in the text, *infra*, p. 164.

(*y*) This sub-section was considered in *Biddell Bros.* v. *E. Clemens Horst Co.*, (1911) 1 K. B. 220; C. A., *ibid.* 934; (1912) A. C. 18. See *ante*, p. 12 *et seq.*

inconsistent with the ownership of the seller (*z*), or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them (*a*).

Questions sometimes arise under c.i.f. contracts in relation to these statutory provisions as to the place where and the time when the buyer c.i.f. must make his examination of the goods, if he is to be entitled to reject, as well as with regard to the circumstances which constitute an act in relation to the goods "which is inconsistent with the ownership of the seller" within the meaning of sect. 35. The place of destination—*primâ facie* the place for examination—may be unsuitable, or the nature or packing of the goods may render examination there unreasonable, and the seller may know that the goods are going on to another destination. In such circumstances, may the place and time for inspection be postponed? Or is the act of sending on the goods an acceptance by the buyer?

(*z*) "If the goods were not in accordance with the contract, the property would not in fact pass to the purchasers upon taking up the documents, if they had not at that time an opportunity of knowing whether or not the goods were in accordance with the contract, or it might be that the property passed conditionally, subject to its reverting to the sellers when the persons who had taken up the documents had exercised their undoubted right to reject. There was no doubt that after delivery was taken under the documents, there was a period during which the buyers could hold the possession, and hold the possession in a position which was neutral as to the rights of property, and as long as they retained the possession on that footing the buyers quite plainly had the right to reject. But if they transferred the possession after it had in fact been handed to them, in circumstances inconsistent either with the goods remaining at that time the property of the sellers, or inconsistent with the goods being eventually restored to the sellers, the buyers did an act which was inconsistent with the ownership of the sellers." *Per* Atkin, L.J., *Hardy & Co. (London), Ltd.* v. *Hillerns & Fowler* (1923), 39 T. L. R. 547, at p. 549 (C. A.), cited *infra,* in the text. Cf. the report, (1923) 2 K. B. at p. 499.

(*a*) See *Heilbutt* v. *Hickson, ubi supra,* where the cases were reviewed (place for inspection of shoes, London or Lille?).

In *Perkins* v. *Bell* (*b*), decided before the passing of the Act, the sale was of barley by sample to be delivered at a railway station near the seller's farm. The seller was aware at the time of the sale that the buyer would resell, and probably to brewers, though when or to whom the resales would take place, he did not know. The buyer on the same day resold the barley to a brewer. The barley sold was by mistake subsequently mixed with inferior barley, and the seller on discovery of the fact notified the buyer of it. The barley so mixed was delivered at the station, and, while it was there, the buyer procured a bulk sample and then directed the station-master to send the bulk on to the brewer. The brewer rejected it as not being according to sample, and the buyer then claimed to reject. It was held by the Court of Appeal (Lindley, Bowen and A. L. Smith, L.JJ.), reversing Lawrance, J., that there was nothing in the contract or the circumstances to rebut the presumption that the place of delivery was to be the place of inspection, and that as the buyer had inspected a sample at the place of delivery and sent the bulk on to his purchaser, he must be considered to have accepted the barley and could not afterwards reject it. "We find no evidence in this case," said Lindley, L.J., delivering the judgment of the Court (*c*), "to dislodge the presumption which *primâ facie* arises, that the place of delivery is the place for inspection. To hold otherwise would be to expose the vendor to unknown risks, impossible of calculation when the contract was entered into. The vendee might consign the barley not only to one, but to different sub-vendees living at different places . . . and until arrival at these places the barley would be at the risk of the vendor. If the barley was rejected by these sub-vendees upon arrival, the vendor would have at his own risk and

(*b*) (1893) 1 Q. B. 193 (C. A.).
(*c*) *Ibid.* at p. 197.

cost to take the barley back from whatever places it might happen to be in . . . or to arrange for its sale at the places where it then was. As to these risks the contract is silent, and in our judgment it is impossible to read into it that the vendor undertook these risks."

In *Molling* v. *Dean* (*d*), a firm of colour printers in Germany contracted to supply buyers in England with a number of books. They supplied a parcel of 40,000 books, which they knew were intended for America. The buyers, without inspecting the books, sent them to America, where they were inspected and rightly rejected as not being of the contract quality. The buyers claimed to reject. It was held by the Divisional Court (Lord Alverstone, C.J., Darling and Channell, JJ.), affirming the decision of the Official Referee, that as the sellers knew that the books were intended for America, that was the proper place for inspection, and the buyers were entitled to reject them and could recover as damages the cost of sending them to America and back to England.

In *Van den Hurk* v. *Martens* (*e*) the question was as to the measure of damages, namely, whether they were to be assessed at the price prevailing at the time of original delivery or at the price prevailing at the time of discovery of breach. There were two sales of sodium sulphide in drums *ex* store Manchester and f.o.b. Manchester respectively. The sellers knew that the drums were intended for export. The buyer resold the drums and, owing to congestion on French railways and other causes, the drums did not reach the ultimate consignees at Lyons and Genoa until some months later. They were there examined and found not to contain sodium sulphide and were rejected, and the original buyer then claimed to reject. Disputes followed, not as to the right to reject, which was not disputed, but as to the measure

(*d*) (1901), 18 T. L. R. 217. It does not appear from the report why the goods could not have been examined in England.

(*e*) (1920) 1 K. B. 850.

of damages. The umpire in an arbitration found that owing to the difficulty of opening and reclosing the drums it was, to the knowledge of both parties, impracticable to open them until they were required for actual use. On a case stated as to whether damages were to be assessed with reference to prices ruling at the time of delivery to the buyer or at the time of discovery of the defects, Bailhache, J., held that the proper basis was the date at which the goods arrived at their ultimate destination, namely, Lyons and Genoa. This case is probably "only an authority for the proposition that where it is reasonable and in the ordinary course of business for goods to be sent on to sub-purchasers without examination, either because of good reasons connected with the business, or because the nature of the goods is such that they ought not to be opened till they have reached the consumer, in that case the damages arising at the later date, when they have got to the consumer, are damages which naturally arise from the breach, and are therefore within the legal measure of damages and recoverable" (*f*).

In *Saunt* v. *Belcher and Gibbons* (*g*), Bailhache, J., explained the reasons for his decision in *Van den Hurk's Case*. There, owing to the nature of the cargo (breeze) and the facilities for examination at the place of immediate destination, Deptford, the buyer lost his right to reject by failure to inspect at Deptford. The sellers in that case knew that the breeze was to go on to France, and it was argued that, because they were aware of that fact, the place for examination and acceptance must be extended from the place at which they were to deliver the goods, viz., Deptford, to France. In support of that contention Bailhache, J.,'s judgment in *Van den Hurk* v.

(*f*) *Per* Greer, J., *Hardy & Co. (London), Ltd.* v. *Hillerns & Fowler*, cited *infra*, in the text.

(*g*) (1920), 26 Com. Cas. 115.

Martens was cited as showing that where goods are sold by a seller who has to deliver them at a destination which, to his knowledge, is not their final destination, but only a place from which there is to be a further transit, the place of inspection and acceptance is removed from the place at which the seller has to make his delivery to the place which is the ultimate destination of the goods. "But that proposition is not by any means universally true; it depends upon this further fact, whether the place at which the seller has to make his delivery, although it is not the ultimate destination of the goods, is a place where, having regard to the nature of the goods and the way in which they are packed, inspection can reasonably be had. . . . I want to say quite clearly, if I did not make it clear in that case, that, in my opinion, in order to postpone the place for inspection it is necessary that there should be the two elements; the original vendor must know, either because he is told or by necessary inference, that the goods are going further on, and the place at which he delivers must either be unsuitable in itself or the nature or packing of the goods must make inspection at that place unreasonable" (*h*).

In the recent case of *Hardy & Co.* (*London*), *Ltd.* v. *Hillerns and Fowler* (*i*) there was a sale of Rosario and/or Santa Fé wheat shipped by steamer from a port or ports in the Argentine c.i.f. Hull. The steamer arrived at Hull on March 18 and reported on March 20. On March 21 the buyers, without having examined the wheat, resold a substantial part of it and forwarded it to sub-purchasers. On March 23 the buyers, having examined samples of the wheat, rejected it as not being Rosario or Santa Fé wheat. It was in fact Entre Rios wheat. The sellers

(*h*) (1920), 26 Com. Cas. 115, at pp. 118, 119.
(*i*) (1923) 1 K. B. 658; (1923) 2 K. B. 490 (C. A.).

disputed the right to reject and the dispute went to arbitration. The arbitrators held that the notice of rejection was given with reasonable promptitude, and the buyers were entitled to reject. It was held by Greer, J., and the Court of Appeal (Bankes, Atkin and Younger, L.JJ.) that the buyers by reselling a part of the wheat without examination and sending it to their sub-purchasers had done an act "inconsistent with the ownership of the seller," and, therefore, had lost the right of rejection. It was unsuccessfully argued for the buyers that, though sect. 35 of the Sale of Goods Act, 1893 (*k*), says that the buyer is deemed to have accepted the goods in certain circumstances, that must be read subject to sect. 34 (1) (*k*), and the buyer is not to be deemed to have accepted the goods unless and until he has had reasonable time for examining them, which reasonable time, it was said, had not expired at the date of rejection. But the Courts held that the true construction of sects. 34 (1) and 35 was that by sect. 35 one of the acts upon the happening of which "the buyer is deemed to have accepted goods" is intimation to the seller that he has accepted them; that such an intimation may be made before there has been a reasonable opportunity of examining them, and if such intimation is given, sect. 35 operates and the buyer is deemed to have accepted the goods; that similarly when goods have been delivered to the buyer and he does an act in relation to them inconsistent with the ownership of the seller, sect. 35 may operate before a reasonable opportunity of examining them has expired.

Rejection on wrong ground.

If the buyer rejects the tender of documents on an insufficient ground he is not thereby precluded from supporting the rejection on other and valid grounds (*l*).

(*k*) Quoted *ante*, p. 161.

(*l*) See *Sanders* v. *Maclean* (1883), 11 Q. B. D. 327, *per* Brett, M.R., at p. 333; *Manbre Saccharine Co.* v. *Corn Products Co.*, (1919) 1 K. B. 198, *per* McCardie, J., at p. 204; *Taylor* v. *Oakes*

"It is a long established rule of law that a contracting party who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not" (*m*). But if he wrongfully repudiates the contract so as to waive the performance of the conditions still performable or dispense the other party from performing his obligations any further he is not released from liability by proving that if he had not repudiated the contract, but called for its performance, the other party would have been unable or unwilling to fulfil his obligations, *e.g.*, that goods would have been tendered which the buyer would have been justified in rejecting (*n*). "Take it on the reason of the thing. The party must show he was ready; but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act" (*o*).

In *Braithwaite* v. *Foreign Hardwood Co.* (*p*) the contract was for the sale of rosewood deliverable in instalments and to be paid for by cash against bill of lading. Before arrival of the first shipment the buyers repudiated the contract on the ground of breach by the seller of an alleged collateral agreement not to supply anyone else in the trade. On its arrival the seller offered the bill of lading to the buyers, and the buyers again refused, and the seller resold. The second shipment was treated

(1922), 38 T. L. R. 349, *per* Greer, J., at p. 351; C. A., 38 T. L. R. 517; *Hansson* v. *Hamel & Horley, Ltd.*, (1922) 2 A. C. 36, at p. 42, *per* Lord Sumner.

(*m*) *Per* Greer, J., *Taylor* v. *Oakes, ubi supra.*

(*n*) See *Braithwaite* v. *Foreign Hardwood Co.*, (1905) 2 K. B. 543 (C. A.); applied in *Taylor* v. *Oakes, ubi supra;* and discussed in *British & Benningtons, Ltd.* v. *N.W. Cachar Tea Co., Ltd.*, (1923) A. C. 48.

(*o*) *Per* Lord Mansfield, *Jones* v. *Barkley* (1781), 2 Doug. 684.

(*p*) (1905) 2 K. B. 543.

in the same way. The buyers subsequently discovered that part of the first shipment was of a somewhat inferior quality. In an action for non-acceptance the buyers contended (i) that the collateral agreement had been made and broken, (ii) that they were entitled to repudiate on the ground that the first shipment was not according to contract. Kennedy, J., held that the collateral agreement never existed, that the repudiation was wrongful and that it was accepted by the seller as final. He also held that the first shipment was not according to contract and would have entitled the buyers to repudiate had they not already repudiated. It was held by the Court of Appeal (Collins, M.R., Mathew and Cozens-Hardy, L.JJ.) that, assuming the seller by offering the cargo after repudiation had elected to keep the contract alive, he was excused from performance of the obligation to prove that the first shipment was not of inferior quality by the act of the buyer which absolved him from performance of conditions of the contract.

This case, as reported, is "not quite easy to understand" (*q*), and it has been sometimes supposed to be inconsistent with the rule of law that a man who puts forward a bad reason for refusing to perform his contract is not liable in damages if there exist in fact grounds which in law justify his refusal. But Greer, J., in the case of *Taylor* v. *Oakes* (*r*), where he discussed the decision in this aspect, expressed the opinion, which was approved in the Court of Appeal (Bankes, Scrutton and Atkin, L.JJ.), that the decision merely meant that a buyer cannot justify his refusal of an offer to deliver goods under the contract by proving that, if he had not refused, the goods when delivered would not have been according to the contract. "It does not decide that if

(*q*) *Per* Lord Sumner, in *British & Benningtón's case* (*infra*), at p. 70.

(*r*) (1922), 38 T. L. R. 349; C. A., *ibid.* 517.

wrong goods or wrong documents of title are actually presented for acceptance to the buyer and refused by him for an untenable reason, he, the buyer, is liable for damages for his justifiable refusal because he gave a wrong reason for it" (*s*).

In *British & Benningtons, Limited* v. *N. W. Cachar Tea Co.* (*t*), where, on the somewhat peculiar facts of the case, it was held that buyers having wrongfully repudiated contracts for delivery of teas in London, the sellers were not bound to prove that they were ready and willing at the date of repudiation to deliver the teas in London, Lord Sumner said, with regard to *Braithwaite's Case,* as follows (*u*): "I do not think that the case, as reported, lays it down that a buyer who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly. If he had repudiated, giving no reason at all, I suppose all reasons and all defences in the action, partial or complete, would be open to him. His motives certainly are immaterial, and I do not see why his reasons should be crucial. What he says is, of course, very material upon the question whether he means to repudiate at all, and, if so, how far and how much, and on the question in what respects he waives the performance of conditions still performable *in futuro* or dispenses the opposite party from performing his own obligations any further; but I do not see how the fact that the buyers have wrongly said 'we treat this contract as being at an end owing to your unreasonable delay in the performance of it' obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether. *Braithwaite's Case* says nothing which affects

(*s*) (1922), 38 T. L. R. 349, at p. 351.
(*t*) (1923) A. C. 48.
(*u*) *Ibid.* at p. 71.

the regular consequences, when it appears that at the time of breach the plaintiff is already completely disabled from doing his part at all."

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2. *Breach of Contract by Buyer.*

Damages for breach.

By the Sale of Goods Act, 1893, s. 49 (1), *where the property in the goods has passed to the buyer* (*a*) and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the *price* of the goods. Sub-sect. (2) provides that where the price is payable on a day irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, *although the property in the goods has not passed, and the goods have not been appropriated to the contract*. But this provision does not avail the seller under an ordinary c.i.f. contract because the ordinary express or implied stipulation that payment is to be against tender of the documents, *e.g.*, "net cash against documents," or "net cash," makes the price *not* "payable on a day certain irrespective of delivery." The point was raised and decided in *Stein, Forbes & Co.* v. *County Tailoring Co.* (*b*), where payment was to be by "cash against documents" and the buyers who rejected the documents were sued for the price. Atkin, J., held that in such a contract the price was payable expressly against delivery, *i.e.*, of the documents, and not on a day certain irrespective of delivery.

(*a*) See *ante*, p. 138, on the passing of property under c.i.f. contracts. In the ordinary case where the seller takes the bill of lading to his own order to secure payment of the price, the property does not pass until tender and payment. In such case the seller's remedy lies in an action for damages for non-acceptance.

(*b*) (1917), 86 L. J. Q. B. 448. And see *per* Roche, J., *Muller, Maclean & Co.* v. *Leslie & Anderson* (1921), VIII. Lloyd's List L. R. 328.

The remedy *where the property has not passed* is an action for damages for non-acceptance. By sect. 50 (1) of the Act, if the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance. The measure of the damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach. (Sect. 50 (2).) Where there is an available market (*c*) for the goods, the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current c.i.f. price at the time or times when the buyer ought to have taken up the documents (sect. 50 (3)) (*d*). Where there is no market for the goods at the time or times in question the general principle stated in sect. 50 (2) (*supra*) must be applied.

Other rights. In addition the seller c.i.f. has the ordinary rights of the unpaid seller against the goods. He is an "unpaid seller" (*e*) if the whole (*f*) of the price is due (*g*) but has not been paid or tendered, or if he has received as conditional payment a bill of exchange or other negotiable instrument and the condition has not been fulfilled by reason of dishonour or otherwise, *e.g.*, insolvency (*h*);

(*c*) See *ante*, p. 154, n. (*d*).

(*d*) See *ante*, p. 154. The remarks there with regard to the damages recoverable by the buyer against the seller apply *mutatis mutandis*.

(*e*) See Sale of Goods Act, 1893, s. 38.

(*f*) "The whole of the price" is the price of all goods where the contract is an entire contract. If the contract is severable, the price can also be apportioned, and in that case it would be the apportioned price of that part of the goods which has not been paid for.

(*g*) The price must be due. "There can be no lien without an immediate right of action for the debt." *Per* Lord Ellenborough, *Raitt* v. *Mitchell* (1815), 4 Camp. 146, at p. 150.

(*h*) As in *Valpy* v. *Oakley* (1851), 16 Q. B. 941. Payment by bill or other negotiable instrument is *primâ facie* only conditional on it being met at maturity, and the burden of proving that the instrument was taken as absolute payment rests upon those who allege it.

and the expression includes persons in a position analogous to that of an unpaid seller (*i*), as, for example, an agent of the seller to whom the bill of lading has been endorsed (*j*), a consignor or agent who has himself paid or is directly responsible for the price (*j*), a principal consigning goods to a factor (*k*), a surety for the buyer who has paid the seller (*l*), a person who has contracted to buy goods and re-sells them without having any property in them (*m*). If the buyer becomes insolvent, the fact that the bill of exchange has not yet matured does not divest the unpaid seller of his rights as such (*n*). Nor does the existence of an unsettled account current between seller and buyer prevent the seller from being an unpaid seller (*o*), unless, it seems, there is an ascertained balance against him (*p*).

His rights against the goods are, summarily stated, as follows (*q*):—

Withholding delivery.

(1) Where the property in the goods has not passed to the buyer, he can withhold delivery by retaining the bill of lading, if the price is due and unpaid or the buyer becomes insolvent, in addition to his other remedies.

Lien.

(2) In the exceptional case where the property has passed but he has reserved the right of disposal of the

(*i*) Sect. 38 (2) of the Act.

(*j*) Sect. 38 (2) of the Act; see Ch. I., p. 25.

(*k*) *Newsome* v. *Thornton* (1805), 6 East, 17.

(*l*) *Imperial Bank* v. *London & St. Katherine's Docks Co.* (1877), 5 C. D. 195.

(*m*) *Jenkyns* v. *Usborne* (1844), 7 M. & G. 678.

(*n*) *Gunn* v. *Bolckow, Vaughan & Co.* (1875), L. R. 10 Ch. 491, at p. 501.

(*o*) *Wood* v. *Jones* (1825), 7 D. & R. 126 (a case of stoppage *in transitu*).

(*p*) *Vertue* v. *Jewell* (1814), 4 Camp. 31.

(*q*) See sect. 39 (2) of the Act as to withholding delivery; sects. 41-43 as to lien; sects. 44-46 as to stoppage *in transitu;* sect. 47 as to dispositions by the buyer; sect. 48 as to resale by the seller. It would be outside the scope of this book to discuss these remedies.

goods, *e.g.*, by taking the bill of lading to his own order, he has a lien on the goods.

Stoppage *in transitu.*

(3) In the case of insolvency of the buyer, when the property has passed and the seller has parted with possession but the buyer is not yet in actual possession of the goods, the seller has the right of stopping the goods *in transitu* and retaining them until payment.

The right of withholding delivery is the ordinary remedy of the unpaid seller, because, as already stated, in the ordinary case the seller c.i.f. reserves a right of disposal by taking the bill of lading to his own order, and the property in the goods does not pass until payment or tender of the price. The right of lien does not strictly arise until the seller has parted with the property in the goods, and the right of stoppage *in transitu* does not arise until he has parted with both property and possession, and then only in the case of insolvency of the buyer.

Resale.

The effect of the exercise by the unpaid seller of his lien or of his right to stop *in transitu* is not to rescind the sale, but if he resells the buyer acquires a good title as against the original buyer, and if the goods are of a perishable nature or if after notice by the seller of intention to resell the buyer does not within a reasonable time pay or tender the price, the seller may resell and also recover damages from the buyer for his breach of contract (*r*). If the resale results in a profit it seems to be doubtful whether the seller is entitled to retain it (*s*). Where the seller expressly reserves a right of resale in case the buyer should make default, and on the buyer making default resells, the original contract is thereby rescinded, but without prejudice to any claim by the

(*r*) Sect. 48 (1), (2), (3) of the Act.

(*s*) See Halsbury's Laws of England, Vol. XXV., s. 461, notes. It depends upon whether a resale under sect. 48 (3) rescinds the contract. If it does, the seller resells as owner and is therefore entitled to any profits resulting from the resale.

seller for damages (*t*); and in such case the seller is entitled to any profit arising from the resale.

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3. *Instalment Shipments.*

C.i.f. contracts are frequently performed by several shipments, and in such cases questions arise as to the rights and liabilities of the seller or the buyer which it is convenient to refer to together.

The contract of sale may provide expressly for shipment by instalments, and a clause to the effect that each shipment is to be treated as a separate contract is quite common. Even where there is no express provision the circumstances of the contract may involve the implication that shipment is to be by instalments. "In many cases of contracts to supply a quantity of goods to be delivered within a fixed period, the whole quantity cannot, from the nature of the case, be delivered at one time" (*u*). Further, an agreement to accept delivery by instalments may be inferred from acceptance and payment of a shipment of part of the goods without objection that complete delivery was not made (*x*). But unless shipment by instalments has been expressly or impliedly agreed between parties, the buyer is not bound to accept (*y*) or entitled to demand (*z*) shipment by instalments.

In contracts for delivery by instalments the buyer who

(*t*) Sect. 48 (4) of the Act.

(*u*) *Colonial Ins. Co. of New Zealand* v. *Adelaide Ins. Co.* (1886), 12 A. C. at p. 138 (P. C.).

(*x*) Cf. *Tarling* v. *O'Riordan* (1878), 2 L. R. Ir. 82, at p. 86 (C. A.).

(*y*) Sect. 31 (1) of the Act.

(*z*) Sect. 30 (1) of the Act; *Kingdom* v. *Cox* (1848), 5 C. B. 522, at p. 526, *per* Wilde, C.J., "If a man contracts to buy 150 quarters of wheat, he is not at liberty to call for a small portion without being prepared to receive the whole quantity."

accepts and pays for one shipment is not thereby precluded from rejecting another shipment if it is not in conformity with the contract. Thus in *Brandt* v. *Lawrence* (*a*) there were two contracts, each for the sale of 4,500 quarters of Russian oats (10 per cent. more or less) at a price including freight and insurance to London "shipment by steamer or steamers" during February. Payment was to be cash against shipping documents (*b*). The seller shipped on one steamer 4,511 quarters against the first contract and 1,139 quarters against the second contract. The buyer refused to accept the whole quantity on the ground that the shipment had not been made in time. The seller afterwards shipped on another steamer the balance of the second contract quantity. The jury found that the shipment on the first steamer was made in time, and that on the second steamer was made too late. It was held by Mellish and James, L.JJ., and Baggallay, J., affirming the judgment of Lord Coleridge, C.J., that the words "by steamer or steamers" showed an intention that the shipment should be made in different parcels and that the buyer was bound to accept them if they were shipped in time and was not entitled to wait to see if the whole quantity was shipped in time. The buyer, therefore, was bound to accept the whole quantity shipped on the first steamer, but not the shipment on the second steamer. In *Tarling* v. *O'Riordan* (*c*), where a retail dealer in Cork ordered from a wholesale clothier in London a quantity of ready-made

(*a*) (1876), 1 Q. B. D. 344.

(*b*) The term as to payment appears from the judgment of Cotton, L.J., in *Reuter* v. *Sala* (1879), 4 C. P. D. 239, at p. 250, and not from the report.

(*c*) (1878), 2 L. R. Ir. 82; followed in *Jackson* v. *Rotax Motor & Cycle Co.*, (1910) 2 K. B. 937 (C. A.), where the sale was of motor horns of different descriptions and pieces, "delivery as required," and the C. A. held that delivery by different parcels was to be inferred, and acceptance of the first instalment did not preclude the buyer from rejecting the later instalments.

clothing consisting of various particulars, and one bale of goods in accordance with the contract was sent by the seller and accepted by the buyer, and a second bale sent ten days later was rejected by the buyer as part of the goods contained in it were not in accordance with the contract, the Court of Appeal in Ireland held that the inference was that the goods were to be delivered in different parcels and that acceptance of the first bale did not preclude him from rejecting the second bale. "The defendant here," said Morris, C.J. (*d*), "accepted the first bale, and used it, finding it was correct; at the time he so accepted it he could not contemplate that the remaining goods would not be sent also correctly. In my opinion the defendant was only bound to pay for the bale that was correct and accepted by him in part performance of his contract, and was not bound to pay for any portion of the second bale which he was not bound to accept."

In *Reuter* v. *Sala* (*e*) there was a sale of twenty-five tons (more or less) Penang pepper, October and/or November shipment, name of vessel or vessels, marks and particulars to be declared within sixty days from date of bill of lading. Within the time stipulated the sellers declared and tendered twenty-five tons by the "Borga." Of this quantity five tons, the subject of a separate bill of lading dated the 11th December, were shipped in December. The buyers having learned this fact refused to accept the declaration. Later, the sellers substituted in respect of the five tons a new declaration of another five tons by the same vessel under a bill of lading of the 29th November. The buyers objected that more than sixty days had elapsed since the date of the bill of lading. An action was brought for non-acceptance. It was held by the Court of Appeal (Cotton and Thesiger, L.JJ.,

(*d*) 2 L. R. Ir. at p. 89.
(*e*) (1879), 4 C. P. D. 239.

Brett, L.J., dissenting), affirming Lord Coleridge, C.J., that the contract was an entire contract; that the sellers, having declared and tendered as an entire whole a shipment only partly in accordance with the contract, could not after the time limited for declaration make a new declaration; and that the buyers were not bound to accept the twenty tons shipped in November and were entitled to reject the whole. "The present contract," said Thesiger, L.J. (*f*), "ought, and must in my opinion, at least, involve this consequence, namely, that where the sellers elect to ship by one vessel the whole quantity contracted to be sold, and declare their election to the buyers, still more when they follow up their election and declaration by tendering the whole quantity pursuant to their declaration, they cannot, after it is discovered that as to a portion of the quantity shipped it was not shipped in accordance with the terms of the contract, and that the buyers are not bound to accept that portion, turn round and call upon them to accept the remaining portion of the quantity shipped, which though physically separable, and the subject of distinct bills of lading, yet had always been treated by the sellers as part of one entire whole, which the buyers by the declaration were told to treat, and by the tender were called upon to accept, as one entire whole." The decision in *Brandt* v. *Lawrence* (*g*) was distinguished on the ground that in that case the contract was divisible and at the time of the buyer's refusal to accept the sellers were acting in strict accordance with the contract and there was nothing to indicate that the contract would not be performed in its entirety. Brett, L.J., who dissented, was of opinion that the first declaration did not bind the sellers conclusively; that it was open to them to make a new declaration, though they made no other declaration within the time limited, and "failed by an incurable failure to

(*f*) (1879), 4 C. P. D. at pp. 246, 247.
(*g*) *Ante*, p. 176.

be able to deliver the other five tons"; that the general principle was that in an instalment contract a breach by the party suing is a breach of only a part of the consideration moving from him and can be compensated in damages; and that the sellers were entitled to recover in respect of the twenty tons, leaving the buyers to a cross action in respect of the five tons.

The difference of opinion seems to have been not as to the principle, but as to the effect of the sellers' declaration, the majority of the Court holding that it constituted an election to deliver at one time, and therefore the contract must be treated as an entire and not an instalment contract.

Further, breach of an instalment contract as regards one or more of the instalments by the seller or by the buyer is not necessarily breach of a condition precedent to the liability of the other party to accept or deliver the remaining instalments (*h*). "Each delivery is really like a delivery under a separate contract, to be paid for separately, and in respect of the non-delivery of which the parties may well be assumed to have contemplated a payment in damages rather than a rescission of the whole contract" (*i*). The principle, as stated by Brett, L.J. (*k*), is that "where in a mercantile contract of purchase and sale of goods to be delivered and accepted the terms of the contract allow the delivery to be by successive deliveries, the failure of the seller or buyer to fulfil his part in any one or more of these deliveries does not absolve the other party from the duty of tendering or accepting in the case of other subsequent deliveries, although the contract was for the purchase and sale of a

(*h*) Sect. 31 (2) of the Act.

(*i*) *Per* Thesiger, L.J., *Reuter* v. *Sala* (1879), 4 C. P. D. 239, at p. 246.

(*k*) *Reuter* v. *Sala* (1879), 4 C. P. D. 239, at p. 256; approved by Farwell, L.J., *Jackson* v. *Rotax Motor & Cycle Co.*, (1910) 2 K. B. at p. 947.

specified quantity of goods, and although the failure of the party suing as to one or more deliveries was incurable in the sense that he never could fulfil his undertaking to accept or deliver the whole of the specified quantity. The reasons given are that such a breach of the party suing is a breach of only a part of the consideration moving from him; that such a breach can be compensated in damages without any necessity for annulling the whole contract; that the true construction of such contracts is that it is not a condition precedent to the obligation to tender or accept a part, that the other party should have been or should be always ready and willing to accept or tender the whole. A consideration of the mercantile consequences of otherwise construing such contracts seems to me to fortify the one construction and to condemn the other."

But a mere partial breach of an instalment contract may justify the other party in repudiating the unfulfilled part of the contract. Whether it has this effect depends upon the circumstances of the case. By sect. 31 (2) of the Sale of Goods Act, 1893, it is provided that "where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries (*l*) in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation (*m*)

(*l*) This expression is presumed to cover failure to make a delivery. See *Coddington* v. *Paleologo* (1867), L. R. 2 Ex. 193; *Bergheim* v. *Blaenavon Iron Co.* (1875), L. R. 10 Q. B. 319.

(*m*) This expression covers the price of an instalment as well as damages. *Per* Farwell, L.J., *Workman, Clark & Co.* v. *Lloyd Brazileno*, (1908) 1 K. B. 968, at p. 979.

but not to a right to treat the whole contract as repudiated." This rule applies even though the contract provides that each shipment is to constitute a separate contract (*n*).

It is not easy, nor would it be justifiable here, to attempt, to reconcile some of the decisions in which it has been held that refusal to deliver, accept, or pay for a particular instalment justified treatment of the contract as repudiated with other decisions in which the contrary has been held (*o*). It will be sufficient to state two general principles which must be borne in mind. These are, firstly, that the breach must be a breach going to the root of the contract (*p*), and, secondly, that each case must be judged on its own merits. As regards the first principle: "In cases of this sort," said Lord Coleridge, C.J. (*q*), "where the question is whether the one party is set free by the action of the other, the real matter for consideration is whether the acts or conduct of the one do or do not amount to an intimation of an intention to abandon and altogether to refuse performance of the contract. I say this in order to explain the ground upon which I think the decisions in these cases must rest. . . .

(*n*) *Berk* v. *Day & White* (1897), 13 T. L. R. 475.

(*o*) See, on the one hand, *Withers* v. *Reynolds* (1831), 2 B. & Ad. 882; *Hoare* v. *Rennie* (1859), 29 L. J. Ex. 73; *Honck* v. *Muller* (1881), 7 Q. B. D. 92 (C. A.); and, on the other hand, *Jonassohn* v. *Young* (1863), 32 L. J. Q. B. 385; *Simpson* v. *Crippin* (1872), L. R. 8 Q. B. 14; *Freeth* v. *Burr* (1874), L. R. 9 C. P. 208. And see the discussion of the cases in Benjamin on Sale, Bk. IV., Pt. II., Ch. I.

(*p*) *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 A. C. 434, where 5,000 tons of steel were to be delivered by instalments, and non-payment of one instalment, under mistaken advice, was held not to justify treatment of the contract as repudiated; *per* Lord Blackburn at p. 443; and see *per* Jessel, M.R., in C. A., 9 Q. B. D. at p. 657; *Rhymney Rail. Co.* v. *Brecon Rail. Co.* (1900), 69 L. J. Ch. 813; *Cornwall* v. *Henson*, (1900) 2 Ch. 298, at p. 300, *per* Collins, L.J.

(*q*) *Freeth* v. *Burr* (1874), L. R. 9 C. P. 208, at p. 213; approved in the H. L. in *Mersey Steel & Iron Co.* v. *Naylor*.

Now, non-payment, on the one hand, or non-delivery on the other, may amount to such an act, or may be evidence for a jury of an intention wholly to abandon the contract and set the other party free." "The rule of law," said Lord Blackburn (*r*), "is that where there is a contract in which there are two parties, each side having to do something, if you see that the failure to perform one part of it goes to the root of the contract, it is a good defence to say 'I am not going on to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'" Lastly, in the words of Lord Selborne (*s*), "You must look at the actual circumstances of the case in order to see whether one party to the contract is relieved from its future performance by the conduct of the other. You must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

One useful illustration of the application of these principles to a c.i.f. contract may be added. In the case of *Millar's Karri & Jarrah Co.* (1902) v. *Weddel, Turner & Co.* (*t*) there was a contract for the sale of blue gum timber in two shipments c.i.f. to a safe port in the United Kingdom. The first shipment was refused by the buyers on the ground (which was established in an arbitration which followed) that the wood did not accord with the contract, and they at the same time intimated that they would refuse to accept the second shipment on the ground that the first instalment was such a departure from the contract as to justify them in refusing to accept either parcel. The sellers, who had tendered the docu-

(*r*) *Mersey Steel & Iron Co.* v. *Naylor* (1884), 9 A. C. at p. 443.
(*s*) *Ibid.* at p. 438.
(*t*) (1908), 14 Com. Cas. 25.

ments in respect of each shipment, denied the allegations and maintained that in any event the buyers were not entitled to say that they would not accept the second shipment before they saw it. It was held by Bigham and Walton, JJ., that the umpire in the arbitration was entitled to draw the inference from the defective delivery of the first instalment that the second instalment would also be bad, and that being so, there was no ground for disturbing his award that the buyers were entitled to treat the contract as repudiated. "If a partial breach," said Bigham, J., "is of such a kind, or takes place in such circumstances, as reasonably to tend to the inference that similar breaches will be committed in relation to subsequent deliveries, the whole contract may then and there be regarded as repudiated, and may be rescinded," whether the breach be in payment by the buyer or in delivery by the seller. And Walton, J., pointed out that a party may be repudiating the contract "although he may be contending that he is performing the contract, and may be intending and expressing an intention to perform what is left of the contract" (*u*).

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4. *Process.*

Process.

It only remains to observe that the effect of the new rule 1 (e) of Order XI. (*v*) and rule 8A of Order IX. (*x*) of the Rules of the Supreme Court has been to remove some of the difficulties which formerly existed in the way of institution of legal proceedings in this country for breaches of c.i.f. contracts.

Under the original Order XI. r. 1 (e) service out of the jurisdiction (*i.e.*, England and Wales) of a writ or

(*u*) *Ibid.* at p. 31.
(*v*) Set out *post*, p. 187.
(*x*) Set out *post*, p. 188.

notice of a writ claiming damages for breach of contract was allowed when the action was founded "on any *breach or alleged breach within the jurisdiction of any contract wherever made, which,* according to the terms thereof, *ought to be performed within the jurisdiction,*" whether in whole or in part (*y*), unless the defendant was domiciled or ordinarily resident in Scotland or Ireland. In order, therefore, to commence suit in this country against a foreign seller it was necessary to show that the contract was such that the whole or part of it was expressly or by implication to be performed within the jurisdiction, and, secondly, that the action was for a breach within the jurisdiction. The decisions as to the application of the rule to c.i.f. contracts are obsolete, since the rule has been superseded, but they are worth mentioning, if only because they exhibit not uninteresting divergence of view as to c.i.f. contracts.

Thus, in *Barrow* v. *Myers* (*z*), where a New York firm sold to English buyers 300 boxes evaporated choice apples 50*s*. per cwt. c.i.f. London, and the apples were shipped and the documents were taken up, but on arrival of the apples the buyers objected that they were not of the contract quality and sought to bring an action in this country against the sellers for breach of contract, the buyers actually got leave under Order XI. r. 1 (e) to serve notice of the writ on the sellers in New York. The decision of the Divisional Court (Manisty and Mathew, JJ.) which affirmed the order was expressed to be on the ground that the fact that the apples arrived in this country in the state in which they did was a breach in this country. The decision, as reported, is difficult to understand and was expressly overruled in *Crozier* v. *Auerbach* (*infra*) twenty years later. The breach of contract was clearly at the place of shipment.

(*y*) *Rein* v. *Stein,* (1892) 1 Q. B. 753.
(*z*) (1888), 4 T. L. R. 441.

In *Wancke* v. *Wingren* (*a*), a case of non-delivery, where the defendant in Sweden had sold wood c.i.f. to an English port, and failed to perform the main part of his contract, Day and A. L. Smith, JJ., held that since all that the defendant had to do was to ship the goods at the Swedish port the breach occurred at the Swedish port where the seller failed to ship and not within the jurisdiction, and therefore Order XI. r. 1 (e) did not apply. It is interesting to observe that in that case it was argued, for the first time apparently, that there was a breach within the jurisdiction by failure of the seller to tender the shipping documents to the buyer in England, though the Court did not deal with the argument in the judgments.

In *Hamlyn* v. *Griendtsveen* (*b*), also a case of non-delivery, the sale was of 5,200 tons of moss litter to be shipped at Rotterdam c.i.f. London. No shipment was made. The buyers obtained leave from a judge in chambers to issue a writ for service on the Dutch sellers by notice, but the Divisional Court (Lord Coleridge, C.J., and Fry, L.J.) set aside the order, and their decision was affirmed by the Court of Appeal (Cotton and Lindley, L.JJ.), on the ground that the plaintiffs had failed to show that the breach of contract occurred within the jurisdiction. No argument appears to have been presented to the Court that the sellers' failure to tender the documents to the buyers in England constituted a breach of contract within the jurisdiction in respect of which the action might be instituted here.

Similarly, in *Parker* v. *Schuller* (*c*), where the goods were sold to be shipped from Germany c.i.f. to Liverpool, and the seller made no shipment, the buyer alleged a breach within the jurisdiction by non-delivery of the

(*a*) (1889), 58 L. J. Q. B. 519.
(*b*) (1890), 6 T. L. R. 225; C. A., *ibid.* at p. 274.
(*c*) (1901), 17 T. L. R. 299.

goods at Liverpool. The judge in Chambers, Farwell, J., who heard the application under Order XI. r. 1 (e) *ex parte* in the first instance, and Lawrance, J., who affirmed his order, held that non-delivery of the goods at Liverpool constituted a breach within the jurisdiction and gave the leave asked for. But a c.i.f. contract is not a contract to deliver goods in this country, and on this ground the order was set aside by the Court of Appeal (A. L. Smith, M.R., Collins and Romer, L.JJ.). The point was taken, however, in the Court of Appeal that there was a breach within the jurisdiction since the seller had failed to present any shipping documents; but the Court declined to deal with a defence of the order appealed from other than that which was put forward in the writ of summons and affidavit.

In *Crozier, Stephens & Co.* v. *Auerbach* (*d*), which was a case of alleged defective delivery, similar to the case of *Barrow* v. *Myers* (*supra*, p. 184), on arrival of the goods sold in England the buyers alleged that they were not in accordance with the contract and obtained leave from Bigham, J., to issue a writ of summons of which notice was to be served on the foreign seller out of jurisdiction. The Court of Appeal (Vaughan Williams and Farwell, L.JJ.), however, set aside the order on the ground that the contract being c.i.f. the alleged breach took place on shipment. The decision in *Barrow* v. *Myers* was overruled.

Then in 1911 came the judgments in *Biddell Bros.* v. *E. Clemens Horst Co.* (*e*) which directed attention to the dual obligation of the seller c.i.f. to ship the goods and tender the documents against which the buyer is bound to make the agreed payment. Thereafter the practice developed in the case of these contracts of giving leave

(*d*) (1908) 2 K. B. 161.

(*e*) (1911) 1 K. B. 214; C. A., *ibid.* 934; (1912) A. C. 18. See *ante*, pp. 12-22.

under Order XI. r. 1 (e) where the cause of action alleged was non-delivery by failure to tender the documents to the buyer in this country.

In 1919 the decision of the House of Lords in *Johnson* v. *Taylor Bros. & Co., Ltd.* (*f*), changed the position. There the Swedish sellers of pig iron c.i.f. Leeds or Manchester failed to make delivery and the buyer applied for leave to serve notice of a writ of summons upon the seller in Sweden alleging breach of contract by failure to tender shipping documents. Lord Coleridge, J., gave leave and the Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) affirmed his order. But in the House of Lords (Lord Birkenhead, L.C., Viscount Haldane, Lords Dunedin, Atkinson and Buckmaster) it was held that though there had been a breach within the jurisdiction by failure to tender the shipping documents, the substantial and effective breach was failure to ship the goods, and in such a case leave to serve notice of the writ out of the jurisdiction could not be granted. But *if the sellers had shipped* the goods sold and had failed to tender the shipping documents in England to the buyer, then a writ of summons for non-tender of the documents would have come within Order XI. r. 1 (e) (*g*).

The practical effect of this decision was to compel English buyers complaining of non-delivery to sue the foreign seller in his own country; but this disadvantage has been since removed by the new rules which extend the right of suit in this country against the foreign trader.

The existing Order XI. r. 1 (e) which has replaced the old rule referred to provides that service out of the jurisdiction of a writ of summons may be allowed where "The action is one brought against a defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract or

(*f*) (1920) A. C. 144.
(*g*) *Per* Lord Atkinson, *ibid.* p. 158.

to recover damages or other relief for or in respect of the breach of a contract

"(i) made within the jurisdiction, *or*

"(ii) made by or through an agent trading or residing within the jurisdiction on behalf of a principal trading or residing out of the jurisdiction, *or*

"(iii) by its terms or by implication to be governed by English law,

"or is one brought against a defendant not domiciled or ordinarily resident in Scotland or Ireland, in respect of a breach committed within the jurisdiction of a contract wherever made, even though such breach was preceded or accompanied by a breach out of the jurisdiction which rendered impossible the performance of the part of the contract which ought to have been performed within the jurisdiction."

The final paragraph of this rule nullifies the decision in *Johnson* v. *Taylor* (*supra*).

Finally, it is to be observed that the new rule 8A of Order IX. (R. S. C. (No. 3), 14th July, 1920) enables a buyer or seller suing on a contract made within the jurisdiction with an agent resident or carrying on business within the jurisdiction on behalf of a foreign seller or buyer, as the case may be, to obtain leave to serve the writ of summons on the agent in England, without having to obtain an order for service out of the jurisdiction under Order XI. The terms of this rule are as follows:—

"Where a contract has been entered into within the jurisdiction by or through an agent residing or carrying on business within the jurisdiction on behalf of a principal residing or carrying on business out of the jurisdiction, a writ of summons in an action relating to or arising out of such contract may by leave of the Court or a judge given before the determination of such agent's

authority or of his business relations with the principal be served on such agent. Notice of the order giving such leave and a copy thereof and of the writ of summons shall forthwith be sent by prepaid registered post letter to the defendant or defendants at his or their address out of the jurisdiction. Provided that nothing in this rule shall invalidate or affect any other mode of service in force at the time this rule comes into operation" (*h*).

(*h*) See the official memorandum (4th December, 1920) as to the exercise of the power of serving an agent given by this rule, 150 L. T. J. 388; 65 S. J. 131, cited in the notes to the rule in the Annual Practice and the Yearly Practice.

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